FILE COPY.

No. 16

ORIGINAL.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1905.

THE STATE OF OREGON, Complainant,

vs.

ETHAN A. HITCHCOCK, Secretary of the Interior, and WILLIAM A. RICHARDS, Commissioner of the General Land Office.

IN EQUITY,

ORIGINAL BILL OF COMPLAINT.

ANDREW M. CRAWFORD,
Attorney General of the State of Oregon.

WILLIAM B. MATTHEWS,
Special Counsel
For the State of Oregon.

John F. Sheiry, Printer, 413-415 Ninth Street, N. W.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1905.

THE STATE OF OREGON, *Complainant*,

v.

ETHAN A. HITCHCOCK, Secretary of the Interior, and WILLIAM A. RICHARDS, Commissioner of the General Land Office, *Defendants.*

Original, No. In Equity.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The State of Oregon, by Andrew M. Crawford, Attorney General of the said State, and William B. Matthews, special counsel, having heretofore obtained leave of this Court in that behalf, files this the bill of complaint of the said State against the above-named defendants, Ethan A. Hitchcock, Secretary of the Interior, and William A. Richards, Commissioner of the General Land Office, and the said complainant shows unto the Court as follows:

I. That the said defendant, Ethan A. Hitchcock, is a citizen of the State of Missouri and is the Secretary of the Interior, and the said William A. Richards is a citizen of the State of Wyoming and is the Commissioner of the General Land Office.

II. That by an Act of Congress approved on the 14th day of February, in the year 1859, the said State of Oregon, complainant herein as aforesaid, was created a State and admitted as one of the States of the United States upon an equal footing with the other States of the Union in all respects whatever.

III. That previous to the said admission of the State of Oregon into the Union; that is to say, by an Act of Congress approved on the 28th day of September, in the year 1850, and entitled, "An Act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," the United States had granted to certain States existing at the date of the said Act all the lands then belonging to the United States and lying within the said States, respectively, which lands were, at the date of the said Act, swamp and overflowed lands and by reason of that fact unfit for cultivation, the said Act being as follows:

"Be it enacted, etc., That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this Act, shall be, and the same are hereby, granted to said State.

"Section 2. And be it further enacted, That it shall be the duty of the Secretary of Interior, as soon as may be practicable after the passage of this Act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the Governor of the State of Arkansas, and, at the request of said Governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State of Arkansas,

subject to the disposal of the Legislature thereof; provided, however, That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

"Section 3. And be it further enacted, That in making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is 'wet and unfit for cultivation,' shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

"Section 4. And be it further enacted, That the provisions of this Act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known and designated as aforesaid, may be situated."

IV. That thereafter, that is to say by an Act of Congress approved on the 12th day of March, in the year 1860, and entitled, "An Act to extend the provisions of an Act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits to Minnesota and Oregon and for other purposes," the United States extended to the State of Oregon, complainant herein, and to the State of Minnesota the provisions of the said Act approved on the 28th day of September, 1850, and granted to the said States, respectively, all the swamp and overflowed lands being within their respective limits, the said Act approved on the 12th day of March, in the year 1860, being as follows:

"Be it enacted, etc., That the provisions of the Act of Congress entitled, 'An Act to enable the State of Arkansas and other States to reclaim the swamp lands within their

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MOTION FOR LEAVE TO FILE BILL OF COMPLAINT.

ANDREW M. CRAWFORD,
Attorney General of the State of Oregon.

WILLIAM B. MATTHEWS,
Special Counsel
For the State of Oregon.

John F. Sheiry, Printer, 413-415 Ninth Street, N. W.

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Original, No. In Equity.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes the State of Oregon by Andrew M. Crawford, Attorney General of the said State, and William B. Matthews, special counsel, and moves the Court that the said State of Oregon may be permitted to file the herewith accompanying bill of complaint in equity against Ethan A. Hitchcock, Secretary of the Interior, a citizen of the State of Missouri, and William A. Richards, Commissioner of the General Land Office, a citizen of the State of Wyoming, as in a cause of which this Court has original jurisdiction; and that, upon the filing of the said bill a subpœna may issue as prayed herein.

ANDREW M. CRAWFORD,
Attorney General of the State of Oregon.

WILLIAM B. MATTHEWS,
Counsel.

ing the making of the said surveys and allotments, and in contemplating the issue of the said patents, assumed and professed to act under the authority and in accordance with the provisions of an act of Congress approved on the twelfth day of February, in the year 1887, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and extend the protection of the laws of the United States and the territories over the Indians, and for other purposes;" and that the said defendant intended and proposed, and does now intend and propose, in professed accordance with the provisions of the said act of Congress, to convey the title and fee simple to and in a large portion of the said body of lands called the Klamath reservation to the several individual members of the said Indian tribes, to the end that the said lands so conveyed and patented may become the property of the said individual Indians and be permanently disposed of, and the title of the said lands permanently and irrevocably be divested from the United States.

VIII. That the body of lands, which, by the said treaty made in the year 1864 and hereinbefore stated and set out, was reserved to the use of the said tribes of Indians as aforesaid, which is in the said treaty described by the boundaries thereof, included within the said boundaries numerous tracts and large areas of lands which had been and were, on the twelfth day of March in the year 1860, swamp and overflowed lands, and thereby rendered unfit for cultivation, and which said tracts and areas of lands were, by reason of that fact, of the character described, and were such lands as were meant and intended by the Act of Congress approved on the said twelfth day of March and hereinbefore stated and recited; and the complainant herein is

advised, and so avers, that, by the terms and according to the true intent, meaning and effect, of the said Act of Congress, the said tracts of land, being at the date of the said Act of Congress the property of the United States, and being public lands of the United States not reserved, sold or disposed of, were granted to the State of Oregon, complainant herein, and became and since have been the property of the said State of Oregon, the said grant being subject only to such present right of occupancy and temporary tenure of the said lands as belonged to the Indian tribes hereinbefore mentioned, by reason of such occupancy, inhabitancy and use of the said lands by the said Indian tribes on the said twelfth day of March, as has hereinbefore been stated and set out.

IX. That after the defendant, Ethan A. Hitchcock, had, as hereinbefore stated, authorized the body of lands reserved for and occupied by the said Indian tribes to be divided into lots and allotted to individual Indians, and while the surveying and alloting of the said reservation was in progress, and before any patents had been issued to any individual Indians or to any other persons for any of the tracts included within the said reservation, that is to say in the year 1902, the State of Oregon, complainant herein, caused an examination to be made of the lands included within the said reservation for the purpose of ascertaining what tracts included therein had been, on the said twelfth day of March in the year 1860, swamp and overflowed lands, and rendered thereby unfit for cultivation; that thereafter, in the year aforesaid, after such examination had been made, the State caused to be prepared a list of the tracts included within the said reservation which appeared, by such examination and by other evidence found by the

officers of the said State charged and concerned with that duty, to have been swamp and overflowed lands and rendered thereby unfit for cultivation on the said twelfth day of March in the year 1860; that, thereafter and in the year 1902, the State by its proper officers, in accordance with the laws of the United States and the regulations of the Department of the Interior and the usual course of practice in such cases, presented to and filed with the United States Surveyor General for the State of Oregon the said list of lands so as aforesaid ascertained and identified as swamp and overflowed lands, together with evidence tending to prove that all the tracts included in the said list had been and were, on the said twelfth day of March in the year 1860, swamp and overflowed lands and rendered thereby unfit for cultivation, which evidence was found and certified by the said Surveyor General to be sufficient to satisfy him that all of the said tracts so selected and claimed by the said State were on the twelfth day of March in the year 1860, swamp and overflowed lands and rendered thereby unfit for cultivation, and the said State of Oregon, by its proper officers, then and thereby and thereupon selected and claimed the said tracts included in the said list as swamp and overflowed lands granted to the said State by the aforesaid Act of Congress approved on the twelfth day of March in the year 1860, and then and thereby and thereupon applied to the proper officers of the United States to inquire into and consider the said claim of the said State, and to examine the evidence offered as aforesaid by the said State and tending to prove that the said tracts were in fact swamp and overflowed lands at the date of the said last mentioned Act of Congress, and to inquire and ascertain by other means whether or not the fact was so and whether or not the said lands were of such character as to have been

granted to the said State by the said Act of Congress, all to the end that the title of the said State to the said lands might be ascertained and established by proper official authority and that the said title might be duly certified by the Secretary of the Interior and afterwards duly perfected by the issue to the said State of patents for the said tracts, all in pursuance of and in accordance with the provisions of the said Act of Congress approved on the twelfth day of March in the year 1860.

X. That the tracts of land, included within the said body of land reserved as aforesaid for the use of the said Indian tribes and called the Klamath Indian reservation, which were, in the manner aforesaid selected and claimed by the said State of Oregon as swamp and overflowed lands granted to the said State by the Act of Congress approved in the year 1860, and are designated and identified in the list hereinbefore mentioned, amount in area to 92,378.09 acres; and that, of the said tracts, there have up to the present time, been allotted to individual Indians and designated for the individual occupation of such Indians with a view to being patented, in the manner aforesaid, to the said Indians, tracts amounting in area to 55,281.84 acres, all of which tracts have been selected and are claimed by the said State as swamp lands granted to the said State.

A copy of the said list of tracts so selected by the said State (which list after the presentation thereof as aforesaid became known and was identified in the Department of the Interior as Oregon swamp land, List No. 82), is appended hereto and marked Exhibit A, and it is prayed that the said copy may be taken and read as a part of this bill, and reference thereto is made for the more particular description of the several tracts of land which are the subject of

the averments made in this and in succeeding paragraphs of this bill.

XI. And the said State of Oregon, complainant herein, upon information and evidence in the possession of the officers of the said State concerned in the premises and charged with the duty of inquiring into the rights of the said State therein, avers that all and singular the tracts of land embraced and described in the said list known as List No. 82, and hereto appended as aforesaid, were, on the twelfth day of March in the year 1860, swamp and overflowed lands and rendered thereby unfit for cultivation, and were on the said day of the character described and contemplated by the Act of Congress approved as herein aforesaid on that day; that all of the said tracts were, on the said day, public lands of the United States, and not reserved for any purpose or dedicated to any use or occupied or used by the United States for any purpose, and not sold, bargained to be sold, or otherwise disposed of in any way; and that the said lands were altogether free of any rightful or colorable claims of title, possession, lien, or other interest in or upon the part of any or all persons whatever, save only such present right of occupancy and temporary tenure of the said lands, by the license and sufferance of the United States, as belonged to the Indian tribes hereinbefore mentioned by reason of such occupancy, inhabitancy and use of the said lands by the said Indians as has been hereinbefore stated and set out.

XII. That after the said complainant had, as is hereinbefore stated, filed with the United States Surveyor General for the State of Oregon the said list of lands selected and claimed by the said complainant as swamp and overflowed lands granted to the said complainant, the said list was, by

the said Surveyor General and in accordance with the regulations and the due course of business of the Department of the Interior, reported and referred to the defendant, William A. Richards, he being then as now the Commissioner of the General Land Office, for the official action of the said defendant as such Commissioner, and the claim of the said State of Oregon, complainant herein, to the tracts included in the said list was duly presented and submitted to the said defendant, as Commissioner aforesaid, for inquiry, adjudication and approval by the said defendant; that, thereafter, on the eighteenth day of November in the year 1903, the said list and the said claim of the said State were referred for official action to one John H. Fimple, then being the Assistant Commissioner of the General Land Office, and on the said last named day, acting in the absence of the said defendant William A. Richards, in the place and stead and by the designation and authority of the said defendant as Acting Commissioner of the General Land Office; and the said John H. Fimple, with the knowledge, assent and approbation of the said defendant, and as such Acting Commissioner considered the said claim of the said State to the said lands, and did, on the day last named, deny and reject the said claim, upon the ground solely that the said lands, whether or not they were swamp and overflowed on the twelfth day of March in the year 1860, were not granted to the said State by the Act of Congress approved on that day, but were excepted from the grant made by the said Act by reason of the fact that the said lands were on the said date occupied and inhabited by Indians; and the said John H. Fimple, Acting Commissioner aforesaid, declined and refused to consider or examine or determine the character and condition of the said tracts existing on the said twelfth day of March in the year 1860, or to inquire or to cause inquiry to be made to ascertain whether

ing at will from place to place within the said region herein above described; that the said Indians used, occupied and inhabited the said region and body of lands in the same manner and by the same kind of title and tenure in and by which they and their ancestors, from time immemorial and before the settlement of white men in this the territory of the now State of Oregon, had used, occupied and inhabited the said region, and by no other or higher or more valid or more definite title, that is to say, by the same kind of aboriginal Indian title and tenure by which the aboriginal Indian inhabitants generally of the present territory of the United States, used, occupied and inhabited the said territory of the United States before the settlement of white races within the said territory; that the said title and tenure of the said Indians, at the date and during the period hereinbefore stated, was no more or other than a mere right and license of present and temporary use, occupancy and possession of the said lands, by the sufferance and at the will of the United States, there being in the said Indians no right or power to alienate the said lands or to convey their right to the possession thereof except to the United States, or to encumber the title to the said lands in any way, the ultimate title and fee simple in and to the said lands being in the United States and subject to be granted by the United States, and the said present use, occupancy and inhabitancy of the said lands by the said Indians being in pursuance of a merely temporary and provisional policy of the United States, in accordance with which policy such use, occupancy and inhabitancy might at any time be terminated by the United States, and which policy contemplated that such use, occupancy and inhabitancy should and would be terminated by the United States at some time; that, on the said 12th day of March, in the year 1860, and for the said

period of more than four years thereafter, no part of the said lands had been reserved for the use or residence of the said Indians, nor had any reservations of any kind been created or defined within the boundaries of the said region, nor had there been, or was there, anything done, or attempted to be done, whether on the part of the said Indians or on the part of the United States by which the said original and theretofore existing aboriginal title and tenure of the said Indians was in any way altered or their said manner of occupation varied; nor had there been, nor was there, any treaty, agreement, law, regulation, order, proclamation, promise, or other act made or done by the United States, or by any officer of the United States, or by any person acting for the United States, whereby the said aboriginal title and tenure of the said Indians had been altered or in any way rendered more valid, or more definite, or more certain, or more permanent, or whereby any reservation for or in favor of the said Indians had been created, defined, agreed upon, authorized or recognized, or the occupancy of the said Indians made, or attempted to be made, more limited or more permanent; and that, by reason of the premises, the said body of lands, on the said 12th day of March in the year 1860, and for a period of more than four years thereafter was the property of the United States and subject to be granted by an Act of Congress.

VII. That on the 14th day of October, in the year 1864, that is to say, more than four and one-half years after the enactment of the Act of Congress, approved on the 12th day of March, in the year 1860, and hereinbefore mentioned and set out, a treaty was negotiated between certain commissioners representing and acting for the United States and the three tribes or bands of Indians, called the

Klamaths, Modocs or Moadocs, and the Yahooskins, which said three tribes then and theretofore inhabited and occupied the region and body of lands hereinbefore mentioned and described in the manner and by the tenure hereinbefore set out; that the said treaty was ratified by the Senate of the United States on the 2nd day of July, in the year 1866, and was proclaimed by the President of the United States on the 17th day of February, in the year 1870; that in and by the said treaty the said three tribes of Indians, in consideration of certain pecuniary payments and other valuable concessions made by the United States, ceded to the United States all their right, title and claim to all the country claimed by them, the said Indians, the said country being, and in the said treaty described as being that region and body of lands hereinbefore mentioned and described by boundaries and stated to have been inhabited and occupied by the said tribes of Indians; and that, in and by the said treaty, the said tribes of Indians reserved to themselves, and consented to accept as a reservation and place of residence for themselves, and the United States agreed that these should be reserved for the use of the said Indians, until other direction in the premises should be given, by the President of the United States, a certain smaller body of lands, being parcel of the said region or body of lands ceded to the United States by the said treaty and included within the boundaries of the said region so ceded to the United States by the said Indians, the text of the said treaty, so far as the same is material to be stated, being as follows:

Article 1. The tribes of Indians aforesaid cede to the United States all their right, title, and claim to all the country claimed by them, the same being determined by the following boundaries, to wit: Beginning at the point where the forty-fourth parallel of north latitude crosses the sum-

mit of the Cascade Mountains; thence following the main dividing ridge of said mountains in a southerly direction to the ridge which separates the waters of Pitt and McCloud rivers from the waters on the north; thence along said dividing ridge in an easterly direction to the southern end of Goose Lake; thence northeasterly to the Southern end of Harney Lake; thence due north to the forty-fourth parallel of north latitude; then west to the place of beginning; provided, That the following-described tract, within the country ceded by this treaty, shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians (and), held and regarded as an Indian reservation, to wit: Beginning upon the eastern shore of the middle Klamath Lake, at the point of Rocks, about twelve miles below the mouth of Williamson's River; thence following up said eastern shore to the mouth of Wood River; thence up Wood River to a point one mile north of the bride at Fort Klamath; thence due east to the summit of the ridge which divides the upper and middle Klamath Lakes; thence along said ridge to a point due east of the north end of the upper lake; thence due east, passing the said north end of the upper lake, to the summit of the mountains on the east side of the lake; thence along said mountain to the point where Sprague's River is intersected by the Ish-tish-ea-wax Creek; thence in a southerly direction to the summit of the mountain, the extremity of which forms the Point of Rocks; thence along said mountain to the place of beginning. And the tribes aforesaid agree and bind themselves that, immediately after the ratification of this treaty, they will remove to said reservation and remain thereon unless temporary leave of absence be granted to them by the superintendent or agent having charge of the tribes.

It is further stipulated and agreed that no white person shall be permitted to locate or remain upon the reservation, except the Indian superintendent and agent, employees of the Indian Department, and officers of the Army of the United States, and that in case persons other than those specified are found upon the reservation, they shall be immediately expelled therefrom; and the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits, is hereby secured to the Indians aforesaid; provided, also, That the right of way for public roads and railroads across said reservation is reserved to citizens of the United States.

VII-a. That the body of land which was, by the said treaty negotiated as herein aforesaid in the year 1864, reserved by the said tribe of Indians for their use and as a place of residence for them, was constituted an Indian reservation, and, from that time to the present has been occupied by the said tribes, and has been administered by the officers of the United States as an Indian reservation, and is called the Klamath Indian Reservation; that, from the creation of the said reservation, for many years, and until about six years before the filing of this bill, the said tribes used, occupied and inhabited the said body of lands after the ancient manner and aboriginal usages and customs of said Indians, and of Indians generally, and in accordance with such aboriginal tenure and right and manner of occupation hereinbefore stated to have been the tenure and manner of occupation held and exercised by the said Indians, and their ancestors from time immemorial, there being no assertion, pretense or claim on the part of the said Indians to any other or more valid title to the said land or to any right

of more permanent or stable occupation and possession; and the said Indians did not assert or occupy the said land in any such way as to assert, for themselves any claim or pretence of permanent title, perpetual possession, or of individual right to the said lands or to any parts of them, nor were any steps taken or action had by or on behalf of the said Indians, or by the United States or by any officers of the United States contemplating or tending toward the conferring of the ultimate title to the said lands, or any of them, upon the said Indians or any of them, or in any manner assuring to or recognizing in the said Indians or any of them any right or color of right to the perpetual possession and permanent occupancy of the said lands or any of them; that, however, in or about the year 1899, the defendant, Ethan A. Hitchcock, being then as now Secretary of the Interior and acting as such, authorized and directed and caused a large portion and several parts of the said body of lands constituting the said reservation to be surveyed and to be divided into numerous definite lots or tracts, for the purpose, and with the intention on the part of the said defendant, to allot the said lots or tracts to the individual and several members of the said Indian tribes, to be by the said individual members held in severalty, and with the further purpose and intention on the part of the said defendant, to issue and deliver to each of the said Indians a patent declaring that the United States holds the tract of land allotted to the said Indian in trust for the said Indian and his heirs for the period of twenty-five years, and that at the expiration of the said period the United States will convey the said tract to the said Indian, or to his heirs, discharged of the said trust and free of any encumbrance whatever; that the said defendant, Ethan A. Hitchcock, as Secretary of the Interior, in authorizing and direct-

limits,' approved September 28, 1850, be, and the same are hereby, extended to the States of Minnesota and Oregon; Provided, That the grant hereby made shall not include any lands which the Government of the United States may have reserved, sold, or disposed of (in pursuance of any law heretofore enacted), prior to the confirmation of title to be made under the authority of the said Act.

"Section 2. And be it further enacted, That the selection to be made from lands already surveyed in each of the States, including Minnesota and Oregon, under the authority of the Act aforesaid, and of the Act to aid the State of Louisiana in draining the swamp lands therein, approved March 2, 1849, shall be made within two years from the adjournment of the Legislature of each State at its next session after the date of this Act; and, as to all lands hereafter to be surveyed, within two years from such adjournment, at the next session, after notice by the Secretary of the Interior to the Governor of the State, that the surveys have been completed and confirmed."

V. That on the said 14th day of February, in the year 1859, and as well as on the said 12th day of March, in the year 1860, the United States owned in fee simple a large region and body of land lying within the boundaries of the said State of Oregon, which region and body of land was bounded in the following manner; that is to say: Beginning at the point where the forty-fourth parallel of north latitude crosses the summit of the Cascade Mountains; thence, following the main dividing ridge of the said mountains in a southerly direction to the ridge which separates the waters of the Pitt and the McCloud rivers from the waters on the north; thence along the said dividing ridge in an easterly direction to the southern end of Goose Lake; thence north-

easterly to the northern end of Harney Lake; thence due north to the forty-fourth parallel of north latitude; thence west to the place of beginning; and that the said body of land was, on the said 12th day of March, in the year 1860, public land of the United States and subject to be granted by the United States, and that no part of the same had been or was reserved or dedicated to any public use, nor had any reservation of any part of the same been made or created, and no part of the said lands had been sold, or bargained to be sold, or otherwise disposed of in pursuance of any law of the United States or otherwise, and the said lands were quite free of any claim, whether of title or of possession, saving and excepting such right to the temporary use and occupancy of the lands as belonged to certain Indian tribes inhabiting the said region, which right of the said Indian tribes is hereinafter and in the next paragraph of this bill stated and defined.

VI. That the region and body of lands in the last paragraph hereof mentioned and described by boundaries was, on the said 12th day of March, in the year 1860, and for a period of more than four years thereafter, occupied and inhabited, in the manner and by the title and right of tenure, hereinafter set forth, by three tribes or bands of Indians, called the Klamath, the Moadoc or Modoc, and the Yahooskin tribes or bands; that the said tribes, were on the date and during the period last aforesaid, few in number, the total population of the said tribes being, as was, during the said periods estimated by the officers of the United States having the care and supervision of them from twelve hundred to fifteen hundred souls; that the said Indians were all in a savage state and utterly uncivilized, and were of nomadic habits, having no fixed places of abode, but roam-

to the State under the swamp land grant of 1860. See also State of Minnesota (32 L. D., 328).

In the matter of the lands included within the Klamath Indian reservation in the State of Oregon, the Indian title still remains unextinguished, and such title was in the same condition at the date of the passage of the swamp land of 1860 as it was after the treaty of 1864. The treaty concluded in 1864 and proclaimed in 1870 but reduced the extent of the possession of these Indians, and was made in pursuance of the policy declared by the Act of August 14, 1848, *supra*; hence, the reservation provided for therein was established in pursuance of a law prior to the swamp land grant of 1860. In this connection see also State of Minnesota (22 L. D., 388), wherein it was held that lands within the Red Lake Indian reservation in the State of Minnesota, having a status very similar to the lands here in question, were held to have been excepted from the grant of swamp lands made to that State by the Act of March 12, 1860, *supra*; in the opinion of this Department, therefore, the grant by the Act of March 12, 1860, did not include any of the lands within the Klamath Indian reservation.

Your office decision is accordingly affirmed, and the list of selections presented on behalf of the State of Oregon, November 17, 1902, for lands within the Klamath Indian reservation will stand rejected.

The papers are returned herewith.

Very respectfully,

THOMAS RYAN,
Acting Secretary."

XIV. That thereafter, that is to say, in the month of June in the year 1904, the said State of Oregon, complainant herein, by the proper officers of the said State, moved and applied to the defendant, Ethan A. Hitchcock, being then as now the Secretary of the Interior, to review and reconsider and reverse the decision theretofore as aforesaid rendered by the said Thomas Ryan as Acting Secretary of the Interior, and in the last paragraph hereof recited and

set out, that thereafter, that is to say, on the seventeenth day of September in the year 1904, the said motion and application of the said State were presented and submitted to the said Thomas Ryan, being the Assistant Secretary of the Interior and on the said day acting as Secretary of the Interior; and on the said day last named, the said Thomas Ryan, acting as Secretary of the Interior as aforesaid, did deny and refuse the said motion and application of the said State, in and by a letter on the said day addressed to the Commissioner of the General Land Office, the said letter being in words and figures as follows:

"*September* 17, 1904.

31-570.

Ex parte,
State of Oregon.

The Commissioner of the
General Land Office.

SIR:

The department has considered the motion filed on behalf of the State of Oregon for review of its decision of May 26, last (32 L. D., 664), in which it was held that the lands in the State of Oregon reserved under the treaty concluded October 14, 1864, made with the Klamath and other tribes of Indians, were reserved in pursuance of a law enacted prior to the swamp land grant of May 12, 1860, to said State, and for that reason are excepted from the operation of said grant.

In support of its motion, the State has been heard both orally and by printed brief, and after a full and very careful consideration of the arguments advanced by the State, the department adheres to its previous decision, and the motion for review is therefore accordingly denied, and is herewith returned to the files of your office relating to said matter.

Very respectfully yours,

THOMAS RYAN,
Acting Secretary."

XV. That all the action taken as aforesaid by the said Thomas Ryan as Acting Secretary of the Interior, in respect of the said claim of the State of Oregon to the lands hereinbefore mentioned and identified, was taken with the knowledge, consent and approbation of the defendant, Ethan A. Hitchcock, and the denial of the said claim of the said State of the said lands was made and declared by and under the authority of the said defendant; and that, thereafter and from thence to the present time, the said defendant has refused and does still refuse to admit or allow the said claim of the said State to the said lands, but has proceeded to allot tracts amounting to 55,281.84 acres of the said lands to divers Indians, members of the Indian tribes hereinbefore named, with the purpose and intention on the part of the said defendant to issue to the said Indians patents for the lots to them respectively allotted in the manner hereinbefore stated and in pursuance of the said Act of Congress approved on the eighth day of February, in the year 1887, and hereinbefore mentioned; that the said defendant, as Secretary of the Interior, has authorized and directed the defendant, William A. Richards, as Commissioner of the General Land Office, to proceed with such allotment of the said lands and to issue patents for the same to the said Indians, pursuant to the said last mentioned Act of Congress; but that, up to the date of the signing of this bill, no patents for any of the said lands have actually been issued.

XVI. And the said State of Oregon, complainant herein, further states and shows unto the Court that the said defendant, Ethan A. Hitchcock, Secretary of the Interior, proposes and threatens to issue and to cause to be issued patents for the said lands, and that the said William A.

Richards, Commissioner of the General Land Office, acting under the directions and authority of the said defendant, Ethan A. Hitchcock, proposes and threatens to issue and cause to be issued such patents, and that the said defendants will proceed to issue such patents and to dispose of the said lands in accordance with the provisions of the said Act of Congress, approved on the eighth day of February in the year 1887, unless the said defendants shall be restrained therefrom by the decree of this Court; that, if the said defendants proceed to execute their said purpose, they will cast a cloud upon the title of the said State to the said lands, and will deprive the said State of the possession and enjoyment of the said lands for a long period of time to the prejudice of the rights and title of the said State, and will vest in the Indians to whom such patent shall be issued an apparent right of present possession and an apparent right to demand, at the end of twenty-five years, a conveyance of fee simple titles to the lands allotted to the said Indians respectively, whereby the title of the said State will be greatly impaired and jeopardized, and the lands are likely to be subjected to waste and other damage by those persons in possession of the same under such patents, and the said State will be put to a great multiplicity of suits and great expense for the establishment of her title to the said lands; and that the said State of Oregon has no adequate remedy at law in the premises.

XVII. That the Klamath reservation, which is, substantially, the body of lands reserved for the use and residence of the Indian tribes hereinbefore named by the treaty negotiated in the year 1864 and hereinbefore set out, is, as appears from an official report made by the Commissioner of Indian Affairs in the year 1903, of an area of 872,186 acres, from which area being deducted the swamp and overflowed

lands claimed by the State of Oregon, as herein stated, there remains an area of 779,807.91 acres free from any claim or title of the said State and available for allotment to the said Indians; that, as appears from an official report made by the Commissioner of Indian Affairs in the year 1902, the total number of Indians then resident upon the said reservation and entitled to share in the allotment thereof was 1,141 persons; wherefore, it appears that the said defendants have at their disposal for such allotment sufficient land to allow to each of the said Indians the maximum area allotable by the said statute providing for such allotments and but little less than 600,000 acres additional, exclusive of the swamp and overflowed lands herein mentioned as selected and claimed by the said State of Oregon; and that the said lands so as aforesaid selected and claimed by the said State and allotted by the defendants to Indians are of the value of more than $55,281.54.

The premises considered, for as much as the State of Oregon, complainant herein, is without remedy in the premises save by the action of this Court, and to the end that the said defendants may, if they can, show cause why the said complainant should not have the relief prayed for, the said complainant prays:

First.—That the writ of subpoena may issue from this Court, addressed to the defendants, Ethan A. Hitchcock, Secretary of the Interior, and William A. Richards, Commissioner of the General Land Office, and requiring them to appear and answer the exigency of this bill, and all and singular the premises and all matters and things herein stated, as fully and particularly as if the same were here again repeated and the said defendants severally and particularly thereunto interrogated, and that the said defendants

may so answer without oath, their oath to such answers being hereby expressly waived.

Second.—That the said defendants may, by decree of this Court, be perpetually enjoined and restrained from alloting to any Indians or other persons any lots, parcels or other portions of the lands selected and designated by the State of Oregon in the list of lands hereinbefore mentioned, and called List No. 82, and from issuing to any person any patent, or other instrument purporting to convey title or to be evidence of title to any lot, parcel or other portion of the said lands, or purporting to create or declare a trust or right of possession in favor of any person to any such lot, parcel or other portion, or purporting to make or to be evidence of any promise, undertaking, agreement, intention or assurance, on the part of the United States or of any Department or officer thereof, to convey or create at any future time, any title, or right of possession, or other interest or colorable claim, in or to any such lot, parcel or portion, to or in favor of any Indian or other person, or from otherwise disposing of any such lot, parcel or other portion of the said lands, until and unless the said defendant, Ethan A. Hitchcock, Secretary of the Interior, or some successor or successors of him in the said office, shall first, and before the issuance of such patent or other instrument, have caused due and just examination and proper inquiry to have been made, to ascertain whether the said lands so proposed to be allotted and patented were on the twelfth day of March in the year 1860 swamp and overflowed lands, and thereby rendered unfit for cultivation, and shall have by due process and upon proper evidence, have decided and adjudicated that the tracts of the said lands so proposed to be allotted and patented were not of such character on the said day.

reserving to themselves a certain described tract or body of land, to be set apart as a residence for the said Indians, to be held and regarded as an Indian Reservation.

The Indian right of occupancy to the lands in the present reservation has never been extinguished, and the lands embraced therein are subject to allotment to the Indians, as provided for by the Act of February 8, 1887 (24 Stat., 388), as amended by the Act of Feb. 28, 1891 (26 Stat., 794). The allotment to an Indian of a tract of land in a territory over which the Indian right of occupancy has not been extinguished, and the perfection of such allotment, has the effect of making his right of occupancy perpetual, and therefore, reserves the land from the operation of the swamp grant.

It is not necessary to consider the question as to the swamp claim to any lands in said reservation which have not been allotted to the Indians, as the reservation is still in existence, and until such reservation is extinguished no action regarding the disposal of lands therein, other than by allotment, can be taken.

In view of the facts above set forth, I am of the opinion that the claim of the State, under the swamp grant, does not attach to any lands in the Klamath Indian Reservation as created by the treaty of Oct. 14, 1864, *supra*, which have been allotted to the Indians, and that the State's claim to such lands should be rejected, in order to leave the allotments free from conflict and ready for patent.

I enclose herewith a list of the lands allotted to the Indians, which tracts are also claimed by the State, as swamp land, and I have to direct that you allow the State sixty days within which to show cause why the swamp claim to such tract should not be rejected for the reasons above set forth. In the event of failure to make such showing within the time allowed, or to appeal herefrom, the claim will be rejected without further notice, and to that end it is hereby held for rejection.

Very respectfully,

J. H. FIMPLE,

Acting Commissioner."

XIII. That after the said Acting Commissioner of the General Land Office had, as is in the last preceding paragraph hereof stated, denied and rejected the said claim of the State of Oregon, complainant herein, to the tracts selected and claimed by the said State in and by the said list called List No. 82, and had rendered and published his decision adverse to the claim of the said State as aforesaid, the said State appealed from the said decision of the said Acting Commissioner of the General Land Office to the Secretary of the Interior, the defendant Ethan A. Hitchcock being then as now such Secretary; that thereafter, that is to say, on the twenty-sixth day of May in the year 1904, the claim of the said State was on such appeal and in the due and regular course of business in the Department of the Interior, duly presented and submitted to one Thomas Ryan, then being Assistant Secretary of the Interior, and, on the said day last mentioned being in the absence and by the designation and authority of the defendant, Ethan A. Hitchcock, the Acting Secretary of the Interior, and acting as such Secretary with the knowledge, assent and approbation of the said defendant, as fully and effectually as the said defendant might and could have acted; that the said Thomas Ryan, acting as Secretary of the Interior, upon the day last mentioned, affirmed the decision theretofore in the premises made by the said John H. Fimple, as Acting Commissioner of the General Land Office, and denied and rejected the said claim of the said State to the tracts designated, selected and claimed by the said State in the said list known as List No. 82, on the ground solely that the said tracts, whether or not they were swamp and overflowed lands and thereby rendered unfit for cultivation the twelfth day of March in the year 1860, were not subject to be granted by the United States and were excepted from the

grant made as aforesaid on the said date to the State of Oregon, by reason of the fact that the said lands were, on the said day last mentioned, occupied and inhabited by Indians in the manner and by the title and right of tenure hereinbefore stated; and the said Thomas Ryan as such Acting Secretary of the Interior, upon the said ground solely, declined and refused to consider, examine or inquire into the condition of the said lands existing on the said twelfth day of March in the year 1860, or to direct or authorize such consideration, examination and inquiry to be made by any of the officers of the Department of the Interior, or to examine any evidence offered by the said State, or otherwise, to prove what was such condition, or to consider, ascertain, determine, declare and certify whether or not the said lands were, on the said twelfth day of March in the year 1860, swamp and overflowed lands and rendered thereby unfit for cultivation; and the said Thomas Ryan, acting as aforesaid as the Secretary of the Interior in the denying and the rejecting of the said claim of the said State and in the adjudging that the said State was not entitled to the said tracts so as aforesaid selected and claimed by it in the said list, and as a ground, among others, for his conclusion and action in the premises, found as a matter of fact submitted and presented to him for his finding, and declared the fact to be, that the said tracts were, on the said twelfth day of March in the year 1860, public lands of the United States, within what is commonly known as Indian country, and not embraced within any defined reservation, or made the subject of any treaty by which the Indian title had been extinguished or otherwise altered; and the aforesaid action of the said Thomas Ryan, Acting Secretary of the Interior, was taken and evidenced in and by a certain decision or official letter of the said Thomas Ryan, ad-

dressed to the Commissioner of the General Land Office, and dated on the twenty-sixth day of May in the year 1904, which letter is in words and figures as follows:

"*May 26, 1904.*

The Commissioner of the
General Land Office.

SIR:

The Department has considered the appeal by the State of Oregon from your office decision of November 18, 1903, wherein you held that the lands within the Klamath Indian reservation, in said State, are excepted from the operation of the grant of swamp lands to said State, made by the act of March 12, 1860 (12 Stat., 3), the first section of which provides as follows:

That the provisions of the Act of Congress entitled "An Act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," approved September twenty-eighth, eighteen hundred and fifty, be and the same are hereby extended to the States of Minnesota and Oregon: *Provided,* that the grant hereby made should not include any lands which the Government of the United States may have reserved, sold or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title to be made under the authority of the said act.

The lands in question were at the date of the passage of the Act of 1860 within what is commonly known as Indian country, not embraced within any defined reservation, but the Indian title thereto had not been extinguished, in fact, no treaty had yet been made with the bands of Indians occupying these lands looking into the extinguishment of such title. That it was within the power of Congress to grant such lands, subject to the Indian right of occupancy, cannot be questioned. See Buttz *vs.* Northern Pacific R. R. Co. (119 U. S., 55), and cases therein cited. The question for consideration in this case is as to whether these lands were reserved, sold or disposed of (in pursuance of any law enacted prior to 1860), prior to the confirmation of title to be made under the swamp land grant, for if they were they

are specifically excepted from the swamp land grant to this State.

It becomes necessary to examine the legislation of Congress with regard to Indian rights within the former Territory, now State, of Oregon, in order to determine this matter.

The Act of August 14, 1848 (9 Stat., 322), established the territorial government of Oregon, and by Section one provided:

That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to affect the authority of the Government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the Government to make if this act had never passed.

This act gives plain recognition to the Indian's title or right of occupancy as theretofore exercised within the boundaries of the Territory thereby established, and clearly establishes a policy with respect to the extinguishment of such title or right of occupancy in pursuance of which a treaty between the United States and the Klamath and Modoc tribes and Yahooskin bands of Sanke Indians, was concluded October 14, 1864, and proclaimed February 17, 1870 (16 Stat., 707). By this treaty the said tribes of Indians ceded to the United States all their right, title and claim to all the country theretofore claimed by them, the same being referred to by boundaries specifically described in Article 1 of said treaty, but it was provided that a certain described tract within the country ceded should be set apart as a residence for the Indians and held and regarded as an Indian reservation, the same being also specifically described in said Article 1 of the treaty. The reservation under this treaty includes the lands here in question, and within its boundaries a large portion of the lands have been allotted to the individual members of the tribes through the intervention of the Indian Bureau of this Department, but patents have not as yet issued upon said allotments.

While the allotments were in progress, the State indicated a purpose to claim portions of the land under the swamp grant, and upon the matter being reported to this Department you were directed January 4, 1901 (30 L. D., 395), to give notice to the Governor of Oregon of all surveys that had been or might thereafter be completed and confirmed within the limits of the Klamath Indian reservation in said State, to the end that any claim the State might desire to make to any of such lands under the swamp land grant, might be presented at the earliest date; and in accordance with the notice thus given, on November 17, 1902, the United States Surveyor General for the district of Oregon reported to your office what is known as swamp land List No. 82, embracing a total area of 92,372.09 acres of land within the limits of this reservation. Notice of the tracts thus claimed by the State was given by your office to the Commissioner of Indian Affairs, and from his report made thereon it appears that allotments have been heretofore made to individual Indians embracing 55,221.84 acres of the lands included in said List No. 82. This list of swamp selections have never received departmental approval, so that there has been no confirmation of title to such lands under the swamp land grant.

In the case of State of Minnesota (27 L. D., 418), which involved a construction of the swamp land grant of March 12, 1860, it was held that "the issue of patent is the final and only act of confirmation of title under the swamp land grant, and as no patent has yet issued for any of these lands, it follows that the reservation was made before the title of the State to any of the land thereon was confirmed."

The lands in question in that case were within what is known as the White Earth reservation, in the State of Minnesota. Those lands were originally embraced within the Indian Country, but were ceded to the United States by treaty of February 22, 1855 (10 Stat., 1165), and remained unreserved public lands of the United States free from any Indian claim, until reserved under the treaty of May 7, 1864 (13 Stat., 693). It was, therefore, held that the swamp lands within the limits of that reservation passed

or not the said tracts were swamp and overflowed lands and thereby rendered unfit for cultivation, or to consider any evidence offered by the said State, or otherwise obtainable, to prove that the said lands were, on the day last named, of such character, or otherwise in any way to consider, ascertain, determine, declare and certify whether or not the said lands were on the said day swamp and overflowed lands and thereby rendered unfit for cultivation; and the said John H. Fimple, as Acting Commissioner aforesaid, on the said eighteenth day of November in the year 1903, denied and rejected the said claim on the grounds aforesaid in and by a certain official letter by him written and addressed to the Register and Receiver of the United States Land Office at Lakeview, in the State of Oregon, which said letter is in words and figures as follows:

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 18, 1903.

Register and Receiver,
Lakeview, Oregon.

SIRS:

On Nov. 17, 1902, the U. S. Surveyor General for the district of Oregon reported to this office swamp land List No. 82, embracing a total area of 92,378.09 acres of land in the Klamath Reservation.

The list was reported in accordance with the instructions of the Secretary of the Interior of Jan. 4, 1901 (30 L. D., 395). In the instructions the following language was used:

For the purpose of making the necessary examination of the lands, preparatory to the making of swamp land selections, agents of the State, upon application to the Indian agent of such reservation, will be permitted to go on and over the reservation and to do all things necessary to the proper selection of any lands therein claimed to come within the terms of the grant of the State. This will not, how-

ever, justify or authorize the disturbing of the occupancy or claim of any Indian, and will not be considered as a recognition of the State's claim, but is done simply that the claim of the State, if any, may be properly presented, duly considered, and rightly determined.

Many of the lands in this reservation have heretofore been allotted to the Indians belonging thereon, but before the issuance of the first or trust patents for such allotments, it is deemed best that the claim, if any, of the State should be determined.

If any selection of claimed swamp lands within the limits of said reservation are made by the State, your office will promptly give notice thereof to the Indian Office, particularly specifying the lands selected.

A list of the lands embraced in said List 82 was furnished the Commissioner of Indian Affairs, and I am now in receipt of a letter from that officer, dated June 23, 1903, in which he furnishes this office with a list of lands which have been allotted to Indians, and which are included in said List 82. The total area allotted to the Indians is 55,281.84 acres.

At the date of the passage of the swamp land grant to Oregon, Mar. 12, 1860 (12 Stat., 3), which is a grant *in praesenti*, therefore acting on the particular date of its passage or not at all, the lands of the Klamath Indians were unceded and were not subject to any general grant, such as is the swamp land grant, and the swamp grant could not, therefore, operate on the lands in question, since—

It is not necessary to constitute an Indian reservation that a treaty or act of Congress shall specifically describe the lands that are reserved. It is sufficient for such purpose if the lands occupied by the Indians are recognized by the officials of the government as reserved Indian lands—*Syllabus*, case of Red Lake Indian Reservation in Minnesota, 22 L. D., 388.

The Klamath Indian Reservation was created by the treaty of Oct. 14, 1864 (16 Stat., 707). By Article one of the treaty the Indians ceded to the United States all their right, title and claim to all of the country claimed by them,

Lot 1, Sec. 1, T. 31 S., R. 7 E., 29.72 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 2, Sec. 1, T. 31 S., R. 7 E., 29.86 acres; Geo. Mercer and W. H. Byars, affiants.

S. ½ N. E. ¼ Sec. 1, T. 31 S., R. 7 E., 80.00 acres; Geo. Mercer and W. H. Byars, affiants.

N. ½ S. E. ¼ Sec. 1, T. 31 S., R. 7 E., 80.00 acres; Geo. Mercer and W. H. Byars, affiants.

E. ½ Sec. 12, T. 31 S., R 7 E., 320.00 acres; Geo. Mercer and W. H. Byars, affiants.

E. ½ Sec. 13, T. 31 S., R. 7 E., 320.00 acres; Geo. Mercer and W. H. Byars, affiants.

S. W. ¼ Sec. 13, T. 31 S., R. 7 E., 160.00 acres; Geo. Mercer and W. H. Byars, affiants.

E. ½ Sec. 24, T. 31 S., R. 7 E., 320.00 acres; Geo. Mercer and W. H. Byars, affiants.

N. W. ¼ Sec. 24, T. 31 S., R. 7 E., 160.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 3, Sec. 24, T. 31 S., R. 13 E., 34.71 acres; D. P. Thompson, W. H. Byars and Geo. Mercer, affiants.

Lot 4, Sec. 24, T. 31 S., R. 13 E., 34.96 acres; D. P. Thompson, W. H. Byars and Geo. Mercer, affiants.

N. W. ¼ N. E. ¼ Sec. 24, T. 31 S., R. 13 E., 40.00 acres; D. P. Thompson, W. H. Byars and Geo. Mercer, affiants.

S. W. ¼ S. E. ¼ Sec. 24, T. 31 S., R. 13 E., 40.00 acres; D. P. Thompson, W. H. Byars and Geo. Mercer, affiants.

S. W. ¼ Sec. 24, T. 31 S., R. 13 E., 160.00 acres; D. P. Thompson, W. H. Byars and Geo. Mercer, affiants.

Lot 1, Sec. 25, T. 31 S., R. 13 E., 34.87 acres; D. P. Thompson, W. H. Byars and Geo. Mercer, affiants.

Lot 2, Sec. 25, T. 31 S., R. 13 E., 34.45 acres; D. P. Thompson, W. H. Byars and Geo. Mercer, affiants.

Lot 3, Sec. 25, T. 31 S., R. 13 E., 39.03 acres; D. P. Thompson, W. H. Byars and Geo. Mercer, affiants.

Lot 4, Sec. 25, T. 31 S., R. 13 E., 33.61 acres; D. P. Thompson, W. H. Byars and Geo. Mercer, affiants.

W. ½ N. E. ¼ Sec. 25, T. 31 S., R. 13 E., 80.00 acres; D. P. Thompson, W. H. Byars and Geo. Mercer, affiants.

N. W. ¼ Sec. 25, T. 31 S., R. 13 E., 160.00 acres; D. P. Thompson, W. H. Byars and Geo. Mercer, affiants.

W. ½ S. E. ¼ Sec. 25, T. 31 S., R. 13 E., 80.00 acres; D. P. Thompson, W. H. Byars and Geo. Mercer, affiants.

S. W. ¼ Sec. 25, T. 31 S., R. 13 E., 160.00 acres; D. P. Thompson, W. H. Byars and Geo. Mercer, affiants.

All Sec. 26, T. 31 S., R. 13 E., 640.00 acres; D. P. Thompson, W. H. Byars and Geo. Mercer, affiants.

E. ½ Sec. 34, T. 31 S., R. 13 E., 320.00 acres; D. P. Thompson, W. H. Byars and Geo. Mercer, affiants.

S. W. ¼ Sec. 34, T. 31 S., R. 13 E., 160.00 acres; D. P. Thompson, W. H. Byars and Geo. Mercer, affiants.

All Sec. 35, T. 31 S., R. 13 E., 640.00 acres; D. P. Thompson, W. H. Byars and Geo. Mercer, affiants.

Lot 1, Sec. 1, T. 31 S., R. 8 E., 19.37 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 1, T. 31 S., R. 8 E., 36.14 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 1, T. 31 S., R. 8 E., 36.14 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 1, T. 31 S., R. 8 E., 30.37 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 5, Sec. 1, T. 31 S., R. 8 E., 35.32 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 6, Sec. 1, T. 31 S., R. 8 E., 30.83 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. ½ N. W. ¼ Sec. 1, T. 31 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. W. ¼ Sec. 1, T. 31 S., R. 8 E., 160.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 2, T. 31 S., R. 8 E., 36.24 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 2, T. 31 S., R. 8 E., 36.44 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 2, T. 31 S., R. 8 E., 36.64 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 2, T. 31 S., R. 8 E., 36.84 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. ½ N. E. ¼ Sec. 2, T. 31 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. ½ N. W. ¼ Sec. 2, T. 31 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. ½ Sec. 2, T. 31 S., R. 8 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. ½ Sec. 3, T. 31 S., R. 8 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. ½ N. E. ¼ Sec. 3, T. 31 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. ½ N. W. ¼ Sec. 3, T. 31 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 3, T. 31 S., R. 8 E., 36.86 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 3, T. 31 S., R. 8 E., 36.70 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 3, T. 31 S., R. 8 E., 36.54 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 3, T. 31 S., R. 8 E., 36.38 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 4, T. 31 S., R. 8 E., 36.25 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 4, T. 31 S., R. 8 E., 36.16 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. ½ N. E. ¼ Sec. 4, T. 31 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. E. ¼ Sec. 4, T. 31 S., R. 8 E., 160.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ Sec. 9, T. 31 S., R. 8 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All Sec. 10, T. 31 S., R. 8 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. ½ N. E. ¼ Sec. 11, T. 31 S. R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. W. ¼ N. E. ¼ Sec. 11, T. 31 S., R. 8 E., 40.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

W. ½ S. E. ¼ Sec. 11, T. 31 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

W. ½ Sec. 11, T. 31 S., R. 8 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 11, T. 31 S., R. 8 E., 39.40 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 11, T. 31 S., R. 8 E., 26.70 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 11, T. 31 S., R. 8 E., 11.14 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec 12, T. 31 S., R. 8 E., 22.93 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 12, T. 31 S., R. 8 E., 37.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 12, T. 31 S., R. 8 E., 7.50 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 14, T. 31 S., R. 8 E., 22.42 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 14, T. 31 S., R. 8 E., 28.93 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 14, T. 31 S., R. 8 E., 23.80 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 14, T. 31 S., R. 8 E., 11.04 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. ½ N. W. ¼ Sec. 14, T. 31 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. W. ¼ N. W. ¼ Sec. 14, T. 31 S., R. 8 E., 40.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All Sec. 15, T. 31 S., R. 8 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ Sec. 17, T. 31 S., R. 8 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. W. ¼ Sec. 17, T. 31 S., R. 8 E., 160.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. E. ¼ Sec. 18, T. 31 S., R. 8 E., 160.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ S. W. ¼ Sec. 18, T. 31 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 18, T. 31 S., R. 8 E., 37.18 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 18, T. 31 S., R. 8 E., 37.22 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 19, T. 31 S., R. 8 E., 37.32 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 19, T. 31 S., R. 8 E., 37.48 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. E. ¼ Sec. 19, T. 31 S., R. 8 E., 160.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ N. W. ¼ Sec. 19, T. 31 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All Sec. 20, T. 31 S., R. 8 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All Sec. 21, T. 31 S., R. 8 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. W. ¼ N. E. ¼ Sec. 22, T. 31 S., R. 8 E., 40.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

W. ½ S. W. ¼ Sec. 22, T. 31 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ S. W. ¼ Sec. 22, T. 31 S., R. 8 E., 40.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. W. ¼ Sec. 22, T. 31 S., R. 8 E., 160.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 22, T. 31 S., R. 8 E., 24.41 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 22, T. 31 S., R. 8 E., 34.17 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 22, T. 31 S., R. 8 E., 21.80 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 22, T. 31 S., R. 8 E., 5.48 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 5, Sec. 22, T. 31 S., R. 8 E., 37.85 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 25, T. 31 S., R. 8 E., 4.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 25, T. 31 S., R. 8 E., 26.45 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 27, T. 31 S., R. 8 E., 4.46 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 27, T. 31 S., R. 8 E., 29.60 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 27, T. 31 S., R. 8 E., 5.25 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

EXHIBIT A.

S. E. ¼ Sec. 10, T. 29 S., R. 9 E., 160.00 acres; D. P. Thompson, affiant.

S. W. ¼ Sec. 11, T. 29 S., R. 9 E., 160.00 acres; W. H. Byars and W. H. Odell, affiants.

W. ½ S. W. ¼ Sec. 13, T. 29 S., R. 9 E., 80.00 acres; W. H. Byars and W. H. Odell, affiants.

S. E. ¼ Sec. 14, T. 29 S., R. 9 E., 160.00 acres; W. H. Byars and W. H. Odell, affiants.

N. W. ¼ Sec. 14, T. 29 S., R. 9 E., 160.00 acres; W. H. Byars and W. H. Odell, affiants.

S. W. ¼ Sec. 14, T. 29 S., R. 9 E., 160.00 acres; W. H. Byars and W. H. Odell, affiants.

N. E. ¼ Sec. 15, T. 29 S., R. 9 E., 160.00 acres; W. H. Byars and W. H. Odell, affiants.

S. E. ¼ Sec. 15, T. 29 S., R. 9 E., 160.00 acres; W. H. Byars and W. H. Odell, affiants.

E. ½ S. W. ¼ Sec. 15, T. 29 S., R. 9 E., 80.00 acres; W. H. Byars and W. H. Odell, affiants.

N. E. ¼ Sec. 19, T. 29 S., R. 9 E., 160.00 acres; W. H. Byars and W. H. Odell, affiants.

S. E. ¼ Sec. 19, T. 29 S., R. 9 E., 160.00 acres; W. H. Byars and W. H. Odell, affiants.

E. ½ N. W. ¼ Sec. 19, T. 29 S., R. 9 E., 80.00 acres; W. H. Byars and W. H. Odell, affiants.

E. ½ S. W. ¼ Sec. 19, T. 29 S., R. 9 E., 80.00 acres; W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 19, T. 29 S., R. 9 E., 40.97 acres; W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 19, T. 29 S., R. 9 E., 40.90 acres; W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 19, T. 29 S., R. 9 E., 40.83 acres; W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 19, T. 29 S., R. 9 E., 40.76 acres; W. H. Byars and W. H. Odell, affiants.

All of Sec. 20, T. 29 S., R. 9 E., 640.00 acres; W. H. Byars and W. H. Odell, affiants.

All of Sec. 21, T. 29 S., R. 9 E., 640.00 acres; W. H. Byars and W. H. Odell, affiants.

All of Sec. 22, T. 29 S., R. 9 E., 640.00 acres; W. H. Byars and W. H. Odell, affiants.

All of Sec. 23, T. 29 S., R. 9 E., 640.00 acres; W. H. Byars and W. H. Odell, affiants.

All of Sec. 24, T. 29 S., R. 9 E., 640.00 acres; W. H. Byars and W. H. Odell, affiants.

All of Sec. 25, T. 29 S., R. 9 E., 640.00 acres; W. H. Byars and W. H. Odell, affiants.

All of Sec. 26, T. 29 S., R. 9 E., 640.00 acres; W. H. Byars and W. H. Odell, affiants.

All of Sec. 27, T. 29 S., R. 9 E., 640.00 acres; W. H. Byars and W. H. Odell, affiants.

All of Sec. 28, T. 29 S., R. 9 E., 640.00 acres; W. H. Byars and W. H. Odell, affiants.

All of Sec. 29, T. 29 S., R. 9 E., 640.00 acres; W. H. Byars and W. H. Odell, affiants.

E. ½ Sec. 30, T. 29 S., R. 9 E., 320.00 acres; W. H. Byars and W. H. Odell, affiants.

E. ½ N. W. ¼ Sec. 30, T. 29 S., R. 9 E., 80.00 acres; W. H. Byars and W. H. Odell, affiants.

E ½ S. W. ¼ Sec. 30, T. 29 S., R. 9 E., 80.00 acres; W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 30, T. 29 S., R. 9 E., 40.65 acres; W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 30., T. 29 S., R. 9 E., 40.52 acres; W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 30, T. 29 S., R. 9 E., 40.39 acres; W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 30, T. 29 S., R. 9 E., 40.26 acres; W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 31, T. 29 S., R. 9 E., 40.12 acres; W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 31, T. 29 S., R. 9 E., 39.94 acres; W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 31, T. 29 S., R. 9 E., 39.76 acres; W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 31, T. 29 S., R. 9 E., 39.52 acres; W. H. Byars and W. H. Odell, affiants.

Lot 5, Sec. 31, T. 29 S., R. 9 E., 39.80 acres; W. H. Byars and W. H. Odell, affiants.

Lot 6, Sec. 31, T. 29 S., R. 9 E., 39.68 acres; D. P. Thompson, affiant.

Lot 7, Sec. 31, T. 29 S., R. 9 E., 39.56 acres; W. H. Byars and W. H. Odell, affiants.

N. E. ¼ Sec. 31, T. 29 S., R. 9 E., 160.00 acres; W. H. Byars and W. H. Odell, affiants.

E. ½ N. W. ¼ Sec. 31, T. 29 S,, R. 9 E., 80.00 acres; W. H. Byars and W. H. Odell, affiants.

N. ½ S. E. ¼ Sec. 31, T. 29 S., R. 9 E., 80.00 acres; W. H. Byars and W. H. Odell, affiants.

N. E. ¼ S. E. ¼ Sec. 31, T. 29 S., R. 9 E., 40.00 acres; W. H. Byars and W. H. Odell, affiants.

N. ½ Sec. 32, T. 29 S., R. 9 E., 320.00 acres; W. H. Byars and W. H. Odell, affiants.

N. ½ S. E. ¼ Sec. 32, T. 29 S., R. 9 E., 80.00 acres; W. H. Byars and W. H. Odell, affiants.

N. ½ S. W. ¼ Sec. 32, T. 29 S., R. 9 E., 80.00 acres; W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 32, T. 29 S., R. 9 E., 39.41 acres; W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 32, T. 29 S., R. 9 E., 39.27 acres; W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 32, T. 29 S., R. 9 E., 39.13 acres; W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 32, T. 29 S., R. 9 E., 38.99 acres; W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 33, T. 29 S., R. 9 E., 38.96 acres; W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 33, T. 29 S., R. 9 E., 39.04 acres; W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 33, T. 29 S., R. 9 E., 39.12 acres; W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 33, T. 29 S., R. 9 E., 39.20 acres; W. H. Byars and W. H. Odell, affiants.

N. ½ Sec. 33, T. 29 S., R. 9 E., 320.00 acres; W. H. Byars and W. H. Odell, affiants.

N. ½ S. E. ¼ Sec. 33, T. 29 S., R. 9 E., 80.00 acres; W. H. Byars and W. H. Odell, affiants.

N. ½ S. W. ¼ Sec. 33, T. 29 S., R. 9 E., 80.00 acres; W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 34, T. 29 S., R. 9 E., 39.30 acres; W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 34, T. 29 S., R. 9 E., 39.42 acres; W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 34, T. 29 S., R. 9 E., 39.54 acres; W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 34, T. 29 S., R. 9 E., 39.66 acres; W. H. Byars and W. H. Odell, affiants.

N. ½ Sec. 34, T. 29 S., R. 9 E., 320.00 acres; W. H. Byars and W. H. Odell, affiants.

N. ½ S. E. ¼ Sec. 34, T. 29 S., R. 9 E., 80.00 acres; W. H. Byars and W. H. Odell, affiants.

N. ½ S. W. ¼ Sec. 34, T. 29 S., R. 9 E., 80.00 acres; W. H. Byars and W. H. Odell, affiants.

N. ½ Sec. 35, T. 29 S., R. 9 E., 320.00 acres; W. H. Byars and W. H. Odell, affiants.

N. ½ S. E. ¼ Sec. 35, T. 29 S., R. 9 E., 80.00 acres; W. H. Byars and W. H. Odell, affiants.

N. ½ S. W. ¼ Sec. 35, T. 29 S., R. 9 E., 80.00 acres; W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 35, T. 29 S., R. 9 E., 39.74 acres; W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 35, T. 29 S., R. 9 E., 39.77 acres; W. H Byars and W. H. Odell, affiants.

Lot 3, Sec. 35, T. 29 S., R. 9 E., 39.80 acres; W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 35, T. 29 S., R. 9 E., 38.83 acres; W. H. Byars and W. H. Odell, affiants.

S. E. ¼ Sec. 7, T. 30 S., R. 10 E., 160.00 acres; D. P. Thompson and Geo. Mercer, affiants.

S. E. ¼ Sec. 8, T. 30 S., R. 10 E., 160.00 acres; D. P. Thompson and Geo. Mercer, affiants.

S. W. ¼ Sec. 8, T. 30 S., R. 10 E., 160.00 acres; D. P. Thompson and Geo. Mercer, affiants.

S. ½ Sec. 9, T. 30, S., R. 10 E., 320.00 acres; D. P. Thompson and Geo. Mercer, affiants.

All Sec. 10, T. 30 S., R. 10 E., 640.00 acres; D. P. Thompson and Geo. Mercer, affiants.

N. W. ¼ Sec. 11, T. 30 S., R. 10 E., 160.00 acres; D. P. Thompson and Geo. Mercer, affiants.

S. ½ Sec. 11, T. 30 S., R. 10 E., 320.00 acres; D. P. Thompson and Geo. Mercer, affiants.

N. ½ N. E. ¼ Sec. 13, T. 30 S., R. 10 E., 80.00 acres; D. P. Thompson and Geo. Mercer, affiants.

S. ½ N. W. ¼ Sec. 13, T. 30 S., R. 10 E., 80.00 acres; D. P. Thompson and Geo. Mercer, affiants.

S. ½ Sec. 13, T. 30 S., R. 10 E., 320.00 acres; D. P. Thompson and Geo. Mercer, affiants.

All Sec. 14, T. 30 S., R. 10 E., 640.00 acres; D. P. Thompson and Geo. Mercer, affiants.

N. ½ Sec. 15, T. 30 S., R. 10 E., 320.00 acres; D. P. Thompson and Geo. Mercer, affiants.

All Sec. 17, T. 30 S., R. 10 E., 640.00 acres; D. P. Thompson and Geo. Mercer, affiants.

N. E. ¼ Sec. 18, T. 30 S., R. 10 E., 160.00 acres; D. P. Thompson and Geo. Mercer, affiants.

S. E. ¼ Sec. 18, T. 30 S., R. 10 E., 160.00 acres; D. P. Thompson and Geo. Mercer, affiants.

Lot 1, Sec. 19, T. 30 S., R. 10 E., 33.40 acres; D. P. Thompson and Geo. Mercer, affiants.

Lot 2, Sec. 19, T. 30 S., R. 10 E., 33.20 acres; D. P. Thompson and Geo. Mercer, affiants.

Lot 3, Sec. 19, T. 30 S., R. 10 E., 33.00 acres; D. P. Thompson and Geo. Mercer, affiants.

Lot 4, Sec. 19, T. 30 S., R. 10 E., 32.80 acres; D. P. Thompson and Geo. Mercer, affiants.

N. E. ¼ Sec. 19, T. 30 S., R. 10 E., 160.00 acres; D. P. Thompson and Geo. Mercer, affiants.

E. ½ N. W. ¼ Sec. 19, T. 30 S., R. 10 E., 80.00 acres; D. P. Thompson and Geo. Mercer, affiants.

E. ½ S. W. ¼ Sec. 19, T. 30 S., R. 10 E., 80.00 acres; D. P. Thompson and Geo. Mercer, affiants.

N. E. ¼ Sec. 20, T. 30 S., R. 10 E., 160.00 acres; D. P. Thompson and Geo. Mercer, affiants.

N. W. ¼ Sec. 21, T. 30 S., R. 10 E., 160.00 acres; D. P. Thompson and Geo. Mercer, affiants.

S. W. ¼ Sec. 21, T. 30 S., R. 10 E., 160.00 acres; D. P. Thompson and Geo. Mercer, affiants.

All Sec. 24, T. 30 S., R. 10 E., 640.00 acres; D. P. Thompson and Geo. Mercer, affiants.

Third.—That this Court will by its decree declare that the title of the United States to all the lands included within the reservation created as hereinbefore stated by the treaty negotiated in the year 1864, and called the Klamath reservation, which were on the twelfth day of March in the year 1860 swamp and overflowed lands, and thereby rendered unfit for cultivation, passed to and became the property of the State of Oregon by virtue and operation of the Act of Congress approved on the said last named date; and that the title to such lands is now in the said State, subject only to such right of temporary and terminable occupation of such lands as may exist in the Indians at present occupying and inhabiting the said reservation and not subject to be defeated by any allotment, patent, agreement or other arrangement having the purpose or effect to make such occupancy permanent or otherwise to impair or prejudice the said title of the said State.

Fourth.—And for such other and further relief in the premises as the nature of the case may require and may be agreeable to equity and good conscience.

ANDREW M. CRAWFORD.
Attorney General of the State of Oregon.

WM. B. MATTHEWS,
Counsel.

UNITED STATES OF AMERICA,
State of Oregon,
County of Marion.
} *ss.*:

Before me personally appeared Geo. E. Chamberlain, who, being first duly sworn, deposed, and on his oath said that he is the Governor of the State of Oregon, named as complainant in the foregoing bill in equity, and that as

such officer he is charged with the duty of inquiring into the facts and matters which are the subject of the said bill; that he has read the said bill, and knows the contents thereof; that all the statements therein made are true, to the best of his knowledge, information and belief, which knowledge, information and belief are for the most part derived from and based upon the matters of official record which are set out and recited in the said bill; and that the said bill is filed by the direction of the Attorney General of the State of Oregon.

GEO. E. CHAMBERLAIN.

Subscribed and sworn to before me, this 24th day of November, 1905.

S. A. KOZER,
Notary Public.

[SEAL.]

Lot 3, Sec 33, T. 30 S., R. 8 E., 39.54 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 33, T. 30 S., R. 8 E., 39.82 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 5, Sec. 33, T. 30 S., R. 8 E., 39.88 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 6, Sec. 33, T. 30 S., R. 8 E., 39.92 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 7, Sec. 33, T. 30 S., R. 8 E., 39.98 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. ½ N. W. ¼ Sec. 33, T. 30 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. E. ¼ Sec. 33, T. 30 S., R. 8 E, 160.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. ½ S. E. ¼ Sec. 33, T. 30 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. ½ S. W. ¼ Sec. 33, T. 30 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 34, T. 30 S., R. 8 E., 39.90 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 34, T. 30 S., R. 8 E., 39.72 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 34, T. 30 S., R. 8 E., 39.52 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 34, T. 30 S., R. 8 E., 39.33 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. ½ Sec. 34, T. 30 S., R. 8 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. ½ S. E. ¼ Sec. 34, T. 30 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. ½ S. W. ¼ Sec. 34, T. 30 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 35, T. 30 S., R. 8 E., 39.26 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 35, T. 30 S., R. 8 E., 39.30 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 35, T. 30 S., R. 8 E., 39.34 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 35, T. 30 S., R. 8 E., 39.38 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. ½ Sec. 35, T. 30 S., R. 8 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. ½ S. E. ¼ Sec. 35, T. 30 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. ½ S. W. ¼ Sec. 35, T. 30 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All of Sec. 2, T. 30 S., R. 9 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All of Sec. 3, T. 30 S., R. 9 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All of Sec. 4, T. 30 S., R. 9 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All of Sec. 5, T. 30 S., R. 9 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ Sec. 6, T. 30 S., R. 9 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ N. W. ¼ Sec. 6, T. 30 S., R. 9 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ S. W. ¼ Sec. 6, T. 30 S., R. 9 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 6, T. 30 S., R. 9 E., 39.66 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 6, T. 30 S., R. 9 E., 39.99 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 6, T. 30 S., R. 9 E., 40.31 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 6, T. 30 S., R. 9 E., 40.64 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ Sec. 7, T. 30 S., R. 9 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ N. W. ¼ Sec. 7, T. 30 S., R. 9 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ S. W. ¼ Sec. 7, T. 30 S., R. 9 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 7, T. 30 S., R. 9 E., 40.84 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 7, T. 30 S., R. 9 E., 40.93 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 7, T. 30 S., R. 9 E., 41.01 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 7, T. 30 S., R. 9 E., 41.01 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All Sec. 8, T. 30 S., R. 9 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All Sec. 9, T. 30 S., R. 9 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All Sec. 10, T. 30 S., R. 9 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All Sec. 11, T. 30 S., R. 9 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

W. ½ Sec. 12, T. 30 S., R. 9 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All Sec. 13, T. 30 S., R. 9 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All Sec. 14, T. 30 S., R. 9 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All Sec. 15, T. 30 S., R. 9 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All Sec. 17, T. 30 S., R. 9 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ Sec. 18, T. 30 S., R. 9 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. E. ¼ Sec. 19, T. 30 S., R. 9 E., 160.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All Sec. 20, T. 30 S., R. 9 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All Sec. 21, T. 30 S., R. 9 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All Sec. 22, T. 30 S., R. 9 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All Sec. 22, T. 30 S., R. 9 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All Sec. 23, T. 30 S., R. 9 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All Sec. 24, T. 30 S., R. 9 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All Sec. 25, T. 30 S., R. 9 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All Sec. 26, T. 30 S., R. 9 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All Sec. 27, T. 30 S., R. 9 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ Sec. 28, T. 30 S., R. 9. E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. W. ¼ Sec. 28, T. 30 S., R. 9. E., 160.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. E. ¼ S. W. ¼ Sec. 28, T. 30 S., R. 9 E., 40.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 28, T. 30 S., R. 9 E., 12.71 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 28, T. 30 S., R. 9 E., 41.15 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. ½ Sec. 29, T. 30 S., R. 9 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. ½ S. W. ¼ Sec. 29, T. 30 S., R. 9 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. W. ¼ S. W. ¼ Sec. 29, T. 30 S., R. 9 E., 40.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 29, T. 30 S., R. 9 E., 36.59 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 29, T. 30 S., R. 9 E., 31.34 acres; D P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 29, T. 30 S., R. 9 E., 6.13 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ Sec. 30, T. 30 S., R. 9 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ N. W. ¼ Sec. 30, T. 30 S., R. 9 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ S. W. ¼ Sec. 30, T. 30 S., R. 9 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 30, T. 30 S., R. 9 E., 40.60 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 30, T. 30 S., R. 9 E., 40.63 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 30, T. 30 S., R. 9 E., 40.67 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 30, T. 30 S., R. 9 E., 40.70 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. E. ¼ Sec. 31, T. 30 S., R. 9 E., 160.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ N. W. ¼ Sec. 31, T. 30 S., R. 9 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 31, T. 30 S., R. 9 E., 40.72 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 31, T. 30 S., R. 9 E., 40.72 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 31, T. 30 S., R. 9 E., 40.72 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 31, T. 30 S., R. 9 E., 9.50 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 5, Sec. 31, T. 30 S., R. 9 E., 38.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 6, Sec. 31, T. 30 S., R. 9 E., 26.23 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 7, Sec. 31, T. 30 S., R. 9 E., 10.50 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. W. ¼ N.W. ¼ Sec. 32, T. 30 S., R. 9 E. 40.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 32, T. 30 S., R. 9 E., 22.69 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 32, T. 30 S., R. 9 E., 12.18 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. E. ¼ Sec. 33, T. 30 S., R. 9 E., 160.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. ½ S. E. ¼ Sec. 33, T. 30 S., R. 9 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 33, T. 30 S., R. 9 E., 37.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 33, T. 30 S., R. 9 E., 30.28 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 33, T. 30 S., R. 9 E., 19.20 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 33, T. 30 S., R. 9 E., 7.57 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 5, Sec. 33, T. 30 S., R. 9 E., 33.94 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 6, Sec. 33, T. 30 S., R. 9 E., 33.94 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. ½ Sec. 34, T. 30 S., R. 9 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. ½ S. E. ¼ Sec. 34, T. 30 S., R. 9 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 13, T. 30 S., R. 8 E., 6.05 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 14, T. 30 S., R. 8 E., 33.54 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 7, Sec. 14, T. 30 S., R. 8 E., 6.46 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 14, T. 30 S., R. 8 E., 26.50 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 6, Sec. 14, T. 30 S., R. 8 E., 13.70 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 14, T. 30 S., R. 8 E., 35.96 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 5, Sec. 14, T. 30 S., R. 8 E., 44.04 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 14, T. 30 S., R. 8 E., 34.27 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 9, Sec. 14, T. 30 S., R. 8 E., 47.18 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 8, Sec. 14, T. 30 S., R. 8 E., 36.55 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. E. ¼ S. E. ¼ Sec. 14, T. 30 S., R. 8 E., 40.00 acres; D. P. Thompson, W. H. Byars and W. H Odell, affiants.

S. W. ¼ N. W. ¼ Sec. 14, T. 30 S., R. 8 E., 40.00 acres; D. P. Thompson, W. H. Byars and W. H Odell, affiants.

S. W. ¼ Sec. 14, T. 30 S., R. 8 E., 160.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 10, T. 30 S., R. 8 E., 39.45 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 10, T. 30 S., R. 8 E., 31.30 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. E. ¼ S. E. ¼ Sec. 10, T. 30 S., R. 8 E., 40.00

acres; D. P. Thompson, W. H. Byars and W. H Odell, affiants.

Lot 1, Sec. 15, T. 30 S., R. 8 E., 37.80 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 15, T. 30 S., R. 8 E., 31.50 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec 15, T. 30 S., R. 8 E., 58.10 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 15, T. 30 S., R. 8 E., 56.93 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 5, Sec. 15, T. 30 S., R. 8 E., 9.80 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 6, Sec. 15, T. 30 S., R. 8 E., 30.60 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 7, Sec. 15, T. 30 S., R. 8 E., 39.60 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 8, Sec. 15, T. 30 S., R. 8 E., 23.07 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 9, Sec. 15, T. 30 S., R. 8 E., 21.90 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 10, Sec. 15, T. 30 S., R. 8 E., 10.70 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. ½ N. E. ¼ Sec. 15, T. 30 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. E. ¼ Sec. 15, T. 30 S., R. 8 E., 160.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

W. ½ S. W. ¼ Sec. 15, T. 30 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 20, T. 30 S., R. 8 E., 36.30 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 20, T. 30 S., R. 8 E., 47.80 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 20, T. 30 S., R. 8 E., 33.20 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 20, T. 30 S., R. 8 E., 39.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 5, Sec. 20, T. 30 S., R. 8 E., 39.73 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 6, Sec. 20, T. 30 S., R. 8 E., 43.97 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. E. ¼ S. E. ¼ Sec. 20, T. 30 S., R. 8 E., 40.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 21, T. 30 S., R. 8 E., 35.50 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 21, T. 30 S., R. 8 E., 32.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 21, T. 30 S., R. 8 E., 33.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 21, T. 30 S., R. 8 E., 34.70 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 5, Sec. 21, T. 30 S., R. 8 E., 45.30 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 6, Sec. 21, T. 30 S., R. 8 E., 47.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 7, Sec. 21, T. 30 S., R. 8 E., 48.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 8, Sec. 21, T. 30 S., R. 8 E., 44.50 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. ½ Sec. 21, T. 30 S., R. 8 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. W. ¼ N. W. ¼ Sec. 22, T. 30 S., R. 8 E., 40.00 acres; D. P. Thompson, W. H. Byars and W. H Odell, affiants.

Lot 1, Sec. 22, T. 30 S., R. 8 E., 27.90 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 22, T. 30 S., R. 8 E., 37.57 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 22, T. 30 S., R. 8 E., 48.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 22, T. 30 S., R. 8 E., 32.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 5, Sec. 22, T. 30 S., R. 8 E., 42.43 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 6, Sec. 22, T. 30 S., R. 8 E., 12.10 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ N. E. ¼ Sec. 22, T. 30 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. ½ Sec. 22, T. 30 S., R. 8 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All of Sec. 23, T. 30 S., R. 8 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 24, T. 30 S., R. 8 E., 38.54 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 24, T. 30 S., R. 8 E., 56.90 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 24, T. 30 S., R. 8 E., 23.10 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 24, T. 30 S., R 8 E., 12.52 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 5, Sec. 24, T. 30 S., R. 8 E., 29.44 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 6, Sec. 24, T. 30 S., R. 8 E., 39.50 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. W. ¼ N. E. ¼, Sec. 24, T. 30 S., R. 8 E., 40.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. ½ N. W. ¼ Sec. 24, T. 30 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. ½ Sec. 24, T. 30 S., R. 8 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All of Sec. 25, T. 30 S., R. 8 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All of Sec. 26, T. 30 S., R. 8 E, 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All of Sec. 27, T. 30 S., R. 8 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. ½ Sec. 28, T. 30 S., R. 8 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. E. ¼ Sec. 28, T. 30 S., R. 8 E., 160.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. ½ S. W. ¼ Sec. 28, T. 30 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 28, T. 30 S., R. 8 E., 21.41 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 28, T. 30 S., R. 8 E., 58.59 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. E. ¼ N. E. ¼ Sec. 29, T. 30 S., R. 8 E., 40.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 29, T. 30 S., R 8 E., 26.40 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 29, T. 30 S., R 8 E., 20.70 acres; D .P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 29, T. 30 S., R 8 E., 39.38 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 29, T. 30 S., R. 8 E., 38.50 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 5, Sec. 29, T. 30 S., R. 8 E., 36.70 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 6, Sec. 29, T. 30 S., R. 8 E., 3.70 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 7, Sec. 29, T. 30 S., R 8 E., 1.50 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 8, Sec. 29, T. 30 S., R 8 E., 40.62 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 9, Sec. 29, T. 30 S., R. 8 E., 39.60 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 5, Sec. 31, T. 30 S., R. 8 E. 34.20 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 6, Sec. 31, T. 30 S., R. 8 E., 45.40 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 7, Sec. 31, T. 30 S., R. 8 E., 34.60 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 32, T. 30 S., R. 8 E., 46.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 32, T. 30 S., R. 8 E., 40.46 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 32, T. 30 S., R. 8 E., 29.60 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 32, T. 30 S., R. 8 E, 10.40 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 5, Sec. 32, T. 30 S., R. 8 E., 40.94 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 6, Sec. 32, T. 30 S., R. 8 E., 34.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 7, Sec. 32, T. 30 S., R. 8 E., 38.97 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 8, Sec. 32, T. 30 S., R 8 E., 39.18 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 9, Sec. 32, T. 30 S., R. 8 E., 39.02 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 10, Sec. 32, T. 30 S., R. 8 E., 38.68 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. E. ¼ N. E. ¼ Sec. 32, T. 30 S., R. 8 E., 40.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 33, T. 30 S., R. 8 E., 19.41 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 33, T. 30 S., R 8 E., 21.05 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 28, T. 31 S., R. 8 E., 38.70 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 28, T. 31 S., R. 8 E., 12.36 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 28, T. 31 S., R. 8 E., 39.54 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 28, T. 31 S., R. 8 E., 20.10 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. ½ N. E. ¼ Sec. 28, T. 31 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. W. ¼ N. E. ¼ Sec. 28, T. 31 S., R. 8 E., 40.00 acres; D. P. Thompson, W. H. Byars and W. H Odell, affiants.

W. ½ Sec. 28, T. 31 S., R. 8 E., 320.00 acres, D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All Sec. 29, T. 31 S., R. 8 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ Sec. 30, T. 31 S., R. 8 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ Sec. 31, T. 31 S., R. 8 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All Sec. 32, T. 31 S., R. 8 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. ½ N. E. ¼ Sec. 33, T. 31 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. W. ¼ Sec. 33, T. 31 S., R. 8 E., 160.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. ½ Sec. 33, T. 31 S., R. 8 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 33, T. 31 S., R. 8 E., 29.99 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 33, T. 31 S., R. 8 E., 18.72 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 34, T. 31 S., R. 8 E., 21.80 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 34, T. 31 S., R. 8 E., 18.72 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 34, T. 31 S., R. 8 E., 27.60 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 34, T. 31 S., R. 8 E., 27.80 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. ½ N. E. ¼ Sec. 24, T. 31 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. ½ N. W. ¼ Sec. 34, T. 31 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. ½ Sec. 34, T. 31 S., R. 8 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

W. ½ S. W. ¼ Sec. 35, T. 31 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. E. ¼ S. W. ¼ Sec. 35, T. 31 S., R. 8 E., 40.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 35, T. 31 S., R. 8 E., 6.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 35, T. 31 S., R. 8 E., 37.28 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 35, T. 31 S., R. 8 E., 9.75 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 35, T. 31 S., R. 8 E., 38.88 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 5, Sec. 35, T. 31 S., R. 8 E., 12.40 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 6, Sec. 35, T. 31 S., R. 8 E., 45.20 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 13, T. 30 S., R. 8 E., 33.95 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 9, Sec. 3, T. 34 S., R. 7½ E., 11.02 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 10, Sec. 3, T. 34 S., R. 7½ E., 27.82 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 11, Sec. 3, T. 34 S., R. 7½ E., 29.88 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 12, Sec. 3, T. 34 S., R. 7½ E., 38.70 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 13, Sec. 3, T. 34 S., R. 7½ E., 23.93 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 4, Sec. 10, T. 34 S., R. 7½ E., 33.38 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 5, Sec. 10, T. 34 S., R. 7½ E., 47.56 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 6, Sec. 10, T. 34 S., R. 7½ E., 16.39 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 7, Sec. 10, T. 34 S., R. 7½ E., 36.22 acres; Geo. Mercer & W. H. Byars, affiants.

N. E. ¼ Sec. 10, T. 34 S., R. 7½ E., 160.00 acres; Geo. Mercer & W. H. Byars, affiants.

N. E. ¼ N. W. ¼ Sec. 10, T. 34 S., R. 7½ E., 40.00 acres; Geo. Mercer and W. H. Byars, affiants.

S. ½ N. E. ¼, Sec. 11, T. 34 S., R. 7½ E., 80.00 acres; Geo. Mercer and W. H. Byars, affiants.

S. ½ N. W. ¼ Sec. 11, T. 34 S., R. 7½ E., 80.00 acres; Geo. Mercer and W. H. Byars, affiants.

S. E. ¼ Sec. 11, T. 34 S., R. 7½ E., 160.00 acres; Geo. Mercer & W. H. Byars, affiants.

N. ½ S. W. ¼ Sec. 11, T. 34 S., R. 7½ E., 80.00 acres; Geo. Mercer and W. H. Byars, affiants.

S. E. ¼ S. W. ¼ Sec. 11, T. 34 S., R. 7½ E., 40.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 2, Sec. 11, T. 34 S., R. 7½ E., 38.04 acres; Geo. Mercer & W. H. Byars, affiants.

W. ½ Sec. 12, T. 34 S., R. 7½ E., 320.00 acres; Geo. Mercer & W. H. Byars, affiants.

W. ½ Sec. 13, T. 34 S., R. 7½ E., 320.00 acres; Geo. Mercer & W. H. Byars, affiants.

N. E. ¼ Sec. 14, T. 34 S., R. 7½ E., 160.00 acres; Geo. Mercer & W. H. Byars, affiants.

E. ½ N. W. ¼ Sec. 14, T. 34 S., R. 7½ E., 80.00 acres; Geo. Mercer and W. H. Byars, affiants.

N. ½ S. E. ¼ Sec. 14, T. 34 S., R. 7½ E., 80.00 acres; Geo. Mercer and W. H. Byars, affiants.

S. E. ¼ S. E. ¼ Sec. 14, T. 34 S., R. 7½ E., 40.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 5, Sec. 14, T. 34 S., R. 7½ E., 27.42 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 6, Sec. 14, T. 34 S., R. 7½ E., 20.61 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 7, Sec. 14, T. 34 S., R. 7½ E., 46.30 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 8, Sec. 14, T. 34 S., R. 7½ E., 13.79 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 9, Sec. 14, T. 34 S., R. 7½ E., 36.02 acres; Geo. Mercer & W. H. Byars, affiants.

N. E. ¼ N. E. ¼ Sec. 23, T. 34 S., R. 7½ E., 40.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 1, Sec. 23, T. 34 S., R. 7½ E., 14.57 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 2, Sec. 23, T. 34 S., R. 7½ E., 32.72 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 3, Sec. 23, T. 34 S., R. 7½ E., 10.87 acres; Geo. Mercer & W. H. Byars, affiants.

N. ½ Sec. 24, T. 34 S., R. 7½ E., 320.00 acres; Geo. Mercer & W. H. Byars, affiants.

S. E. ¼ Sec. 24, T. 34 S., R. 7½ E., 160.00 acres; Geo. Mercer & W. H. Byars, affiants.

N. E. ¼ S. W. ¼ Sec. 24, T. 34 S., R. 7½ E., 40.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 6, Sec. 24, T. 34 S., R. 7½ E., 37.70 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 7, Sec. 24, T. 34 S., R. 7½ E., 41.36 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 8, Sec. 25, T. 34 S., R. 7½ E., 12.86 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 9, Sec. 25, T. 34 S., R. 7½ E., 19.75 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 10, Sec. 25, T. 34 S., R. 7½ E., 9.40 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 11, Sec. 25, T. 34 S., R. 7½ E., 15.89 acres; Geo. Mercer & W. H. Byars, affiants.

N. ½ N. E. ¼ Sec. 25, T. 34 S., R. 7½ E., 80.00 acres; Geo. Mercer and W. H. Byars, affiants.

S. E. ¼ N. E. ¼ Sec. 25, T. 34 S., R. 7½ E., 40.00 acres; Geo. Mercer and W. H. Byars, affiants.

E. ½ S. E. ¼ Sec. 25, T. 34 S., R. 7½ E., 80.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 2, Sec. 15, T. 33 S., R. 7½ E., 29.16 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 3, Sec. 15, T. 33 S., R. 7½ E., 31.98 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 4, Sec. 15, T. 33 S., R. 7½ E., 38.11 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 8, Sec. 15, T. 33 S., R. 7½ E., 3.12 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 9, Sec. 15, T. 33 S., R. 7½ E., 37.44 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 10, Sec. 15, T. 33 S., R. 7½ E., 40.52 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 11, Sec. 15, T. 33 S., R. 7½ E., 40.49 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 12, Sec. 15, T. 33 S., R. 7½ E., 40.51 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 13, Sec. 15, T. 33 S., R. 7½ E., 40.52 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 14, Sec. 15, T. 33 S., R. 7½ E., 37.17 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 15, Sec. 15, T. 33 S., R. 7½ E., 3.38 acres; Geo. Mercer & W. H. Byars, affiants.

S. W. ¼ S. E. ¼ Sec. 15, T. 33 S., R. 7½ E., 40.00 acres; Geo. Mercer and W. H. Byars, affiants.

S. E. ¼ S. W. ¼ Sec. 15, T. 33 S., R. 7½ E., 40.00 acres; Geo. Mercer and W. H. Byars, affiants.

N. ½ S. E. ¼ Sec. 27, T. 33 S., R. 7½ E., 80.00 acres; Geo. Mercer and W. H. Byars, affiants.

N. E. ¼ Sec. 27, T. 33 S., R. 7½ E., 160.00 acres; Geo. Mercer and W. H. Byars, affiants.

All Sec. 35, T. 33 S., R. 7½ E., 640.00 acres; Geo. Mercer and W. H. Byars, affiants.

E. ½ Sec. 22, T. 33 S., R. 7½ E., 320.00 acres; Geo. Mercer and W. H. Byars, affiants.

W. ½ N. W. ¼ Sec. 1, T. 31 S., R. 10 E., 80.00 acres; W. H. Byars and W. H. Odell, affiants.

S. W. ¼ Sec. 1, T. 31 S., R. 10 E., 160.00 acres; W. H. Byars and W. H. Odell, affiants.

W. ½ N. E. ¼ Sec. 12, T. 31 S., R. 10 E., 80.00 acres; W. H. Byars and W. H. Odell, affiants.

S. E. ¼ Sec. 12, T. 31 S., R. 10 E., 160.00 acres; W. H. Byars and W. H. Odell, affiants.

S. E. ¼ N. E. ¼ Sec. 12, T. 31 S., R. 10 E., 40.00 acres; W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 1, T. 32 S., R. 8 E., 31.90 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 1, T. 32 S., R. 8 E., 36.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 1, T. 32 S., R. 8 E., 46.72 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 1, T. 32 S., R. 8 E., 37.25 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 5, Sec. 1, T. 32 S., R. 8 E., 31.50 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 6, Sec. 1, T. 32 S., R. 8 E., 29.20 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. E. ¼ S. E. ¼ Sec. 1, T. 32 S., R. 8 E., 40.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. W. ¼ S. W. ¼ Sec. 1, T. 32 S., R. 8 E., 40.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 2, T. 32 S., R. 8 E., 16.26 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 2, T. 32 S., R. 8 E., 39.92 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 5, Sec. 2, T. 32 S., R. 8 E., 31.17 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. W. ¼ N. E. ¼ Sec. 2, T. 32 S., R. 8 E., 40.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 5, T. 32 S., R. 8 E., 40.81 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 5, T. 32 S., R. 8 E., 40.94 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. ½ N. W. ¼ Sec. 5, T. 32 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. W. ¼ Sec. 5, T. 32 S., R. 8 E., 160.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 6, T. 32 S., R. 8 E., 40.88 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 6, T. 32 S., R. 8 E., 40.62 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. ½ N. E. ¼ Sec. 6, T. 32 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. E. ¼ Sec. 6, T. 32 S., R. 8 E., 160.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ Sec. 7, T. 32 S., R. 8 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

W. ½ Sec. 8, T. 32 S., R. 8 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

W. ½ Sec. 17, T. 32 S., R. 8 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ Sec. 19, T. 32 S., R. 8 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All Sec. 20, T. 32 S., R. 8 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. ½ Sec. 29, T. 32 S., R. 8 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. E. ¼ Sec. 30, T. 32 S., R. 8 E., 160.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ N. W. ¼ Sec. 30, T. 32 S., R. 8 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 30, T. 32 S., R. 8 E., 39.83 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 30, T. 32 S., R. 8 E., 39.72 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 4, T. 32 S., R. 9 E., 6.50 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 4, T. 32 S., R. 9 E., 29.99 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 4, T. 32 S., R. 9 E., 29.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. ½ S. W. ¼ Sec. 34, T. 30 S., R. 9 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 34, T. 30 S., R. 9 E., 33.86 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 34, T. 30 S., R. 9 E., 33.71 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 34, T. 30 S., R. 9 E., 33.55 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 34, T. 30 S., R. 9 E., 33.40 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. ½ Sec. 35, T. 30 S., R. 9 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. ½ S. E. ¼, Sec. 35, T. 30 S., R. 9 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. ½ S. W. ¼ Sec. 35, T. 30 S., R. 9 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 35, T. 30 S., R. 9 E., 33.22 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 35, T. 30 S., R. 9 E., 33.02 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 35, T. 30 S., R. 9 E., 32.92 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 35, T. 30 S., R. 9 E., 32.62 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 6, T. 31 S., R. 11 E., 28.05 acres; Geo. Mercer and W. H. Odell, affiants.

Lot 2, Sec. 6, T. 31 S., R. 11 E., 28.08 acres; Geo. Mercer and W. H. Odell, affiants.

Lot 3, Sec. 6, T. 31 S., R. 11 E., 34.84 acres; Geo. Mercer and W. H. Odell, affiants.

Lot 4, Sec. 6, T. 31 S., R. 11 E., 49.57 acres; Geo. Mercer and W. H. Odell, affiants.

S. E. ¼ N. E. ¼ Sec. 4, T. 31 S., R. 9 E., 40.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 4, T. 31 S., R. 9 E., 39.65 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 4, T. 31 S., R. 9 E., 43.92 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 4, T. 31 S., R. 9 E., 24.84 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 4, T. 31 S., R. 9 E., 23.50 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 5, Sec. 4, T. 31 S., R. 9 E., 9.48 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 6, Sec. 4, T. 31 S., R. 9 E., 17.12 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 7, Sec. 4, T. 31 S., R. 9 E., 10.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 8, Sec. 4, T. 31 S., R. 9 E., 8.83 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 8, T. 31 S., R. 9 E., 6.87 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 9, T. 31 S., R. 9 E., 32.95 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 9, T. 31 S, R. 9 E., 9.65 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 9, T. 31 S., R. 9 E., 6.06 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 9, T. 31 S., R. 9 E., 10.26 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 5, Sec. 9, T. 31 S., R. 9 E., 22.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 6, Sec. 9, T. 31 S., R. 9 E., 38.28 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 7, Sec. 9, T. 31 S., R. 9 E., 6.89 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 8, Sec. 9, T. 31 S., R. 9 E., 18.24 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 9, Sec. 9, T. 31 S., R. 9 E., 30.61 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 10, Sec. 9, T. 31 S., R. 9 E., 7.22 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 11, Sec. 9, T. 31 S., R. 9 E., 6.84 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 12, Sec. 9, T. 31 S., R. 9 E., 6.70 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 13, Sec. 9, T. 31 S., R. 9 E., 3.45 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 14, Sec. 9, T. 31 S., R. 9 E., 3.24 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 15, Sec. 9, T. 31 S., R. 9 E., 19.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

W. ½ S. E. ¼ Sec. 9, T. 31 S., R. 9 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ S. W. ¼ Sec. 9, T. 31 S., R. 9 E, 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 10, T. 31 S., R. 9 E., 32.72 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 10, T. 31 S., R 9 E., 16.87 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 10, T. 31 S., R. 9 E., 32.67 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 10, T. 31 S., R. 9 E., 46.84 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 5, Sec. 10, T. 31 S., R. 9 E., 23.62 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 6, Sec. 10, T. 31 S., R. 9 E., 7.28 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ N. W. ¼ Sec. 10, T. 31 S., R. 9 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ S. W. ¼ Sec. 10, T. 31 S., R. 9 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. E. ¼ S. E. ¼ Sec. 17, T. 31 S. R. 9 E., 40.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 17, T. 31 S., R. 9 E., 21.86 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 17, T. 31 S., R. 9 E., 32.58 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 17, T. 31 S., R. 9 E., 43.30 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 17, T. 31 S., R. 9 E., 13.08 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 20, T. 31 S., R. 9 E., 14.61 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 20, T. 31 S., R. 9 E., 16.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 20, T. 31 S., R. 9 E., 53.04 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 20, T. 31 S., R. 9 E., 43.07 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ N. E. ¼ Sec. 20, T 31 S., R. 9 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ S. W. ¼ Sec. 28, T. 31 S., R. 9 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 28, T. 31 S., R. 9 E., 39.12 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 28, T. 31 S., R. 9 E., 22.35 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, N. of Lake, Sec. 29, T. 31 S., R. 9 E., 30.45 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1 S. of Lake, Sec. 29, T. 31 S., R. 9 E., 14.77 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 29, T. 31 S., R. 9 E., 29.87 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

E. ½ S. W. ¼ Sec. 30, T. 31 S., R. 9 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. W. ¼ S. E. ¼ Sec. 30, T. 31 S., R. 9 E., 40.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 30, T. 31 S., R. 9 E., 38.63 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 30, T. 31 S., R. 9 E., 43.88 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 30, T. 31 S., R. 9 E., 22.97 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 30, T. 31 S., R. 9 E., 22.38 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 5, Sec. 30, T. 31 S., R. 9 E., 28.66 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 6, Sec. 30, T. 31 S., R. 9 E., 34.85 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. W. ¼ N. E. ¼ Sec. 32, T. 31 S., R. 9 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

W. ½ S. E. ¼ Sec. 32, T. 31 S., R. 9 E., 40.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 32, T. 31 S., R. 9 E., 35.50 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 32, T. 31 S., R. 9 E., 20.36 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 32, T. 31 S., R. 9 E., 13.79 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 32, T. 31 S., R. 9 E., 24.05 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 33, T. 31 S., R. 9 E., 13.66 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 33, T. 31 S., R. 9 E., 43.79 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 33, T. 31 S., R. 9 E., 27.27 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 33, T. 31 S., R. 9 E., 34.79 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. E. ¼ N.W. ¼ Sec. 33, T. 31 S., R. 9 E., 40.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All Sec. 1, T. 36 S., R 7½ E., 640.00 acres; Geo. Mercer & W. H. Byars, affiants.

N. ½ Sec. 2, T. 36 S., R. 7½ E., 320.00 acres; Geo. Mercer & W. H. Byars, affiants.

S. E. ¼ Sec. 2, T. 36 S., R. 7½ E., 160.00 acres; Geo. Mercer and W. H. Byars, affiants.

N. E. ¼ S. W. ¼ Sec. 2, T. 36 S., R. 7½ E., 40.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 1, Sec. 2, T. 36 S., R. 7½ E., 39.28 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 2, Sec. 2, T. 36 S., R. 7½ E., 9.86 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 3, Sec. 2, T. 36 S., R 7½ E., 38.20 acres; Geo. Mercer and W. H. Byars, affiants.

N. ½ N. E. ¼ Sec. 3, T. 36 S., R. 7½ E., 80.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 1, Sec. 3, T. 36 S., R 7½ E., 17.80 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 1, Sec. 3, T. 36 S., R. 7½ E., 17.80 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 3, Sec. 2, T. 36 S., R. 7½ E., 38.20 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 4, Sec. 3, T. 36 S., R. 7½ E., 39.80 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 5, Sec. 3, T. 36 S., R. 7½ E., 14.24 acres; Geo. Mercer & W. H. Byars, affiants.

N. E. ¼ Sec. 11, T. 36 S., R. 7½ E., 160.00 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 1, Sec. 11, T. 36 S., R. 7½ E., 20.26 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 2, Sec. 11, T. 36 S., R. 7½ E., 26.19 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 3, Sec. 11, T. 36 S., R. 7½ E., 13.13 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 4, Sec. 11, T. 36 S., R. 7½ E., 15.80 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 5, Sec. 11, T. 36 S., R 7½ E., 9.20 acres; Geo. Mercer & W. H. Byars, affiants.

N. W. ¼ N. E. ¼ Sec. 12, T. 36 S., R. 7½ E., 40.00 acres; Geo. Mercer and W. H. Byars, affiants.

S. ½ N. E. ¼ Sec. 12, T. 36 S., R. 7½ E., 80.00 acres; Geo. Mercer and W. H. Byars, affiants.

N. W. ¼ Sec. 12, T. 36 S., R. 7½ E., 160.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 1, Sec. 12, T. 36 S., R. 7½ E., 19.00 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 2, Sec. 12, T. 36 S., R. 7½ E., 6.36 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 3, Sec. 12, T. 36 S., R. 7½ E., 7.80 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 4, Sec. 12, T. 36 S., R. 7½ E., 10.58 acres; Geo. Mercer & W. H. Byars, affiants.

W. ½ Sec. 1, T. 34 S., R. 7½ E., 320.00 acres; Geo. Mercer & W. H. Byars, affiants.

All Sec. 2, T. 34 S., R. 7½ E., 640.00 acres; Geo. Mercer & W. H. Byars, affiants.

E. ½ Sec. 3, T. 34 S., R. 7½ E., 320.00 acres; Geo. Mercer & W. H. Byars, affiants.

Lot 5, Sec. 6, T. 31 S., R. 11 E., 49.56 acres; Geo. Mercer and W. H. Odell, affiants.

Lot 6, Sec. 6, T. 31 S., R. 11 E., 49.55 acres; Geo. Mercer and W. H. Odell, affiants.

S. ½ N. E. ¼ Sec. 6, T. 31 S., R. 11 E., 80.00 acres; Geo. Mercer and W. H. Odell, affiants.

S. E. ¼ Sec. 6, T. 31 S., R. 11 E., 160.00 acres; Geo. Mercer and W. H. Odell, affiants.

Lot 1, Sec. 7, T. 31 S., R. 11 E., 49.52 acres; Geo. Mercer and W. H. Odell, affiants.

Lot 2, Sec. 7, T. 31 S., R. 11 E., 49.49 acres; Geo. Mercer and W. H. Odell, affiants.

Lot 3, Sec. 7, T. 31 S., R. 11 E., 49.45 acres; Geo. Mercer and W. H. Odell, affiants.

Lot 4, Sec. 7, T. 31 S., R. 11 E., 49.42 acres; Geo. Mercer and W. H. Odell, affiants.

N. E. ¼ Sec. 7, T. 31 S., R. 11 E., 160.06 acres; Geo. Mercer and W. H. Odell, affiants.

N. ½ S. E. ¼ Sec. 7, T. 31 S., R. 11 E., 80.00 acres; Geo. Mercer and W. H. Odell, affiants.

S. E. ¼ S. E. ¼ Sec. 7, T. 31 S., R. 11 E., 40.00 acres; Geo. Mercer and W. H. Odell, affiants.

Lot 1, Sec. 18, T. 31 S., R. 11 E., 49.39 acres; Geo. Mercer and W. H. Odell, affiants.

Lot 2, Sec. 18, T. 31 S., R. 11 E., 49.36 acres; Geo. Mercer and W. H. Odell, affiants.

Lot 3, Sec. 18, T. 31 S., R. 11 E., 49.34 acres; Geo. Mercer and W. H. Odell, affiants.

Lot 4, Sec. 18, T. 31 S., R. 11 E., 49.31 acres; Geo. Mercer and W. H. Odell, affiants.

E. ½ Sec. 18, T. 31 S., R. 11 E., 320.00 acres; Geo. Mercer and W. H. Odell, affiants.

Lot 2, Sec. 27, T. 35 S., R. 7½ E., 18.06 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 3, Sec. 27, T. 35 S., R. 7½ E., 28.50 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 4, Sec. 27, T. 35 S., R. 7½ E., 39.11 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 5, Sec. 27, T. 35 S., R. 7½ E., 14.28 acres; Geo. Mercer and W. H. Byars, affiants.

S. ½, S. E. ¼, Sec. 27, T. 35 S., R. 7½ E., 80.00 acres; Geo. Mercer and W. H. Byars, affiants.

S. ½, S. W. ¼, Sec. 27, T. 35 S., R. 7½ E., 80.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 1, Sec. 28, T. 35 S., R. 7½ E., 26.96 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 2, Sec. 28, T. 25 S., R. 7½ E., 32.16 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 3, Sec. 28, T. 35 S., R. 7½ E., 41.27 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 1, Sec. 33, T. 35 S., R. 7½ E., 42.84 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 2, Sec. 33, T. 35 S., R. 7½ E., 41.85 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 3, Sec. 33, T. 35 S., R. 7½ E., 36.99 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 4, Sec. 33, T. 35 S., R. 7½ E., 29.42 acres; Geo. Mercer and W. H. Byars, affiants.

All Sec. 34, T. 35 S., R. 7½ E., 640.00 acres; Geo. Mercer and W. H. Byars, affiants.

All Sec. 35, T. 35 S., R. 7½ E., 640.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 3, Sec. 3, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 4, Sec. 3, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 5, Sec. 3, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 6, Sec. 3, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 11, Sec. 3, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 12, Sec. 3, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 13, Sec. 3, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 14, Sec. 3, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 19, Sec. 3, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 20, Sec. 3, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 21, Sec. 3, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 22, Sec. 3, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 27, Sec. 3, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 28, Sec. 3, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 29, Sec. 3, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 30, Sec. 3, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 1, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 2, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 4, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 5, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 6, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 7, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 8, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 9, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 10, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 11, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 12, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 13, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 14, Sec 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 15, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 16, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 17, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 18, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 19, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 20, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 21, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 22, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 23, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 24, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 25, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 26, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 27, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 28, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 29, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 30, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 31, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 32, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 1, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 2, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 3, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 4, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 5, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 6, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 7, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 8, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 9, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 10, Sec. 4, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 11, Sec. 5, T 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 12, Sec. 5, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 13, Sec. 5, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 14, Sec. 5, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 15, Sec. 5, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 16, Sec. 5, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 17, Sec. 5, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 18, Sec. 5, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 19, Sec. 5, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 20, Sec. 5, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 21, Sec. 5, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 22, Sec. 5, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 23, Sec. 5, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 24, Sec. 5, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 25, Sec. 5, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 26, Sec. 5, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 27, Sec. 5, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 28, Sec. 5, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 29, Sec. 5, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 30, Sec. 5, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 31, Sec. 5, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 32, Sec. 5, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 1, Sec. 6, T. 36 S., R. 7 E., 40.02 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 2, Sec. 6, T. 36 S., R. 7 E., 40.05 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 3, Sec. 6, T. 36 S., R. 7 E., 40.09 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 4, Sec. 6, T. 36 S., R. 7 E., 40.12 acres; Geo. Mercer and W. H. Byars, affiants.

E. ½, Sec. 6, T. 36 S., R. 7 E., 320.00 acres; Geo. Mercer and W. H. Byars, affiants.

E. ½, N. W. ¼, Sec. 6, T. 36 S., R. 7 E., 80.00 acres; Geo. Mercer and W. H. Byars, affiants.

E. ½, S. W. ¼, Sec. 6, T. 36 S., R. 7 E., 80.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 4, Sec. 4, T. 32 S., R. 9 E., 7.89 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 5, Sec. 4, T. 32 S., R. 9 E., 20.24 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 6, Sec. 4, T. 32 S., R. 9 E., 10.90 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 7, Sec. 4, T. 32 S., R. 9 E., 17.50 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 8, Sec. 4, T. 32 S., R. 9 E., 28.75 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 9, Sec. 4, T. 32 S., R. 9 E., 3.08 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

N. W. ¼ S. W. ¼ Sec. 4, T. 32 S., R. 9 E. 40.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. W. ¼ S. W. ¼ Sec. 4, T. 32 S., R. 9 E., 40.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 1, T. 32 S., R. 13 E., 32.82 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 1, T. 32 S., R. 13 E., 39.78 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 1, T. 32 S., R. 13 E., 39.69 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 1, T. 32 S., R. 13 E., 39.59 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 6, Sec. 1, T. 32 S., R. 13 E., 32.75 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 7, Sec. 1, T. 32 S., R. 13 E., 32.65 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 5, Sec. 1, T. 32 S., R. 13 E., 32.85 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. W. ¼ N. E. ¼ Sec. 1, T. 32 S., R. 13 E., 40.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. ½ N. W. ¼ Sec. 1, T. 32 S., R. 13 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

W. ½ S. E. ¼ Sec. 1, T. 32 S., R. 13 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. W. ¼ Sec. 1, T. 32 S., R. 13 E., 160.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 2, T. 32 S., R. 13 E., 39.55 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 2, T. 32 S., R. 13 E., 39.56 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 2, T. 32 S., R. 13 E., 39.58 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 2, T. 32 S., R. 13 E., 39.59 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. ½ N. E. ¼ Sec. 2, T. 32 S., R. 13 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. ½ N. W. ¼ Sec. 2, T. 32 S., R. 13 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

S. ½ Sec. 2, T. 32 S., R. 13 E., 320.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

All Sec. 11, T. 32 S., R. 13 E., 640.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 1, Sec. 12, T. 32 S., R. 13 E., 32.63 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 2, Sec. 12, T. 32 S., R. 13 E., 32.66 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 3, Sec. 12, T. 32 S., R. 13 E., 32.51 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

Lot 4, Sec. 12, T. 32 S., R. 13 E., 32.28 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

W. ½ N. E. ¼ Sec. 12, T. 32 S., R. 13 E., 80.00 acres; D. P. Thompson, W. H. Byars and W. H. Odell, affiants.

W. ½ S. E. ¼ Sec. 12, T. 32 S., R. 13 E., 80.00 acres; D. P. Thompson, Geo. Mercer and W. H. Byars, affiants.

W. ½ Sec. 12, T. 32 S., R. 13 E., 320.00 acres; D. P. Thompson, Geo. Mercer and W. H. Byars, affiants.

Lot 1, Sec. 13, T. 32 S., R. 13 E., 31.86 acres; D. P. Thompson, Geo. Mercer and W. H. Byars, affiants.

Lot 2, Sec. 13, T. 32 S., R. 13 E., 31.77 acres; D. P. Thompson, Geo. Mercer and W. H. Byars, affiants.

Lot 3, Sec. 13, T. 32 S., R. 13 E., 32.65 acres; D. P. Thompson, Geo. Mercer and W. H. Byars, affiants.

Lot 4, Sec. 13, T. 32 S., R. 13 E., 33.35 acres; D. P. Thompson, Geo. Mercer and W. H. Byars, affiants.

W. ½ N. E. ¼ Sec. 13, T. 32 S., R. 13 E., 80.00 acres; D. P. Thompson, Geo. Mercer and W. H. Byars, affiants.

W. ½ S. E. ¼ Sec. 13, T. 32 S., R. 13 E., 80.00 acres; D. P. Thompson, Geo. Mercer and W. H. Byars, affiants.

W. ½ Sec. 13, T. 32 S., R. 13 E., 320.00 acres; D. P. Thompson, Geo. Mercer and W. H. Byars, affiants.

All Sec. 14, T. 32 S., R. 13 E., 640.00 acres; D. P. Thompson, Geo. Mercer and W. H. Byars, affiants.

All Sec. 23, T. 32 S., R. 13 E., 640.00 acres; D. P. Thompson, Geo. Mercer and W. H. Byars, affiants.

Lot 1, Sec. 24, T. 32 S., R. 13 E., 34.09 acres; D. P. Thompson, Geo. Mercer and W. H. Byars, affiants.

Lot 2, Sec. 24, T. 32 S., R. 13 E., 35.07 acres; D. P. Thompson, Geo. Mercer and W. H. Byars, affiants.

Lot 3, Sec. 24, T. 32 S., R. 13 E., 36.05 acres; D. P. Thompson, Geo. Mercer and W. H. Byars, affiants.

Lot 4, Sec. 24, T. 32 S., R. 13 E., 37.03 acres; D. P. Thompson, Geo. Mercer and W. H. Byars, affiants.

W. ½ N. E. ¼ Sec. 24, T. 32 S., R. 13 E., 80.00 acres; D. P. Thompson, Geo. Mercer and W. H. Byars, affiants.

W. ½ S. E. ¼ Sec. 24, T. 32 S., R. 13 E., 80.00 acres; D. P. Thompson, Geo. Mercer and W. H. Byars, affiants.

W. ½ Sec. 24, T. 32 S., R. 13 E., 320.00 acres; D. P. Thompson, Geo. Mercer and W. H. Byars, affiants.

Lot 1, Sec. 25, T. 32 S., R. 13 E., 37.90 acres; D. P. Thompson, Geo. Mercer and W. H. Byars, affiants.

Lot 2, Sec. 25, T. 32 S., R. 13 E., 38.67 acres; D. P. Thompson, Geo. Mercer and W. H. Byars, affiants.

Lot 3, Sec. 25, T. 32 S., R. 13 E., 39.43 acres; D. P. Thompson, Geo. Mercer and W. H. Byars, affiants.

Lot 4, Sec. 25, T. 32 S., R. 13 E., 40.20 acres; D. P. Thompson, Geo. Mercer and W. H. Byars, affiants.

W. ½ N. E. ¼ Sec. 25, T. 32 S., R. 13 E., 80.00 acres; D. P. Thompson, Geo. Mercer and W. H. Byars, affiants.

W. ½ S. E. ¼ Sec. 25, T. 32 S., R. 13 E., 80.00 acres; D. P. Thompson, Geo. Mercer and W. H. Byars, affiants.

W. ½ Sec. 25, T. 32 S., R. 13 E., 320.00 acres; D. P. Thompson, Geo. Mercer and W. H. Byars, affiants.

All Sec. 26, T. 32 S., R. 13 E., 640.00 acres; D. P. Thompson, Geo. Mercer and W. H. Byars, affiants.

All Sec. 35, T. 32 S., R. 13 E., 640.00 acres; D. P. Thompson, Geo. Mercer and W. H. Byars, affiants.

Lot 3, Sec. 6, T. 35 S., R. 7 E., 20.16 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 4, Sec. 6, T. 35 S., R. 7 E., 17.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 9, Sec. 6, T. 35 S., R. 7 E., 16.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 10, Sec. 6, T. 35 S., R. 7 E., 15.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 15, Sec. 6, T. 35 S., R. 7 E., 14.50 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 16, Sec. 6, T. 35 S., R. 7 E., 14.50 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 21, Sec. 6, T. 35 S., R. 7 E., 13.81 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 22, Sec. 6, T. 35 S., R. 7 E., 11.65 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 3, Sec. 7, T. 35 S., R. 7 E., 11.50 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 4, Sec. 7, T. 35 S., R. 7 E., 13.50 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 9, Sec. 7, T. 35 S., R. 7. E., 15.60 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 10, Sec. 7, T. 35 S., R. 7. E., 16.50 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 15, Sec. 7, T. 35 S., R. 7 E., 18.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 16, Sec. 7, T. 35 S., R. 7 E., 20.60 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 21, Sec. 7, T. 35 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 22, Sec. 7, T. 35 S., R. 7 E., 3.40 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 23, Sec. 7, T. 35 S., R. 7 E., 5.30 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 24, Sec. 7, T. 35 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 3, Sec. 18, T. 35 S., R. 7 E., 30.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 4, Sec. 18, T. 35 S., R. 7 E., 4.25 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 5, Sec. 18, T. 35 S., R. 7 E., 2.90 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 6, Sec. 18, T. 35 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 11, Sec. 18, T. 35 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 12, Sec. 18, T. 35 S., R. 7 E., 1.65 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 13, Sec. 18, T. 35 S., R. 7 E., .40 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 14, Sec. 18, T. 35 S., R. 7 E., 19.62 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 19, Sec. 18, T. 35 S., R. 7 E., 12.05 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 20, Sec. 18, T. 35 S., R. 7 E., 11.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 25, Sec. 18, T. 35 S., R. 7 E., 12.50 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 26, Sec. 18, T. 35 S., R. 7 E., 14.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 3, Sec. 19, T. 35 S., R. 7 E., 14.25 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 28, Sec. 19, T. 35 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 29, Sec. 19, T. 35 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 3, Sec. 30, T. 35 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 4, Sec. 30, T. 35 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 5, Sec. 30, T. 35 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 6, Sec. 30, T. 35 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 14, Sec. 30, T. 35 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 21, Sec. 30, T. 35 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 27, Sec. 30, T. 35 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 5, Sec. 31, T. 35 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 11, Sec. 31, T. 35 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 20, Sec. 31, T. 35 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 1, Sec. 24, T. 35 S., R. 7½ E., 34.14 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 2, Sec. 24, T. 35 S., R. 7½ E., 31.52 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 3, Sec. 24, T. 35 S., R. 7½ E., 33.62 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 4, Sec. 24, T. 35 S., R. 7½ E., 26.36 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 5, Sec. 24, T. 35 S., R. 7½ E., 18.03 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 6, Sec. 24, T. 35 S., R. 7½ E., 21.34 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 7, Sec. 24, T. 35 S., R. 7½ E., 13.76 acres; Geo. Mercer and W. H. Byars, affiants.

S. E. ¼ S. W. ¼ Sec. 24, T. 35 S., R. 7½ E., 40.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 1, Sec. 25, T. 35 S., R. 7½ E., 6.15 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 2, Sec. 25, T. 35 S., R. 7½ E., 12.34 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 3, Sec. 25, T. 35 S., R. 7½ E., 18.98 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 4, Sec. 25, T. 35 S., R. 7½ E., 23.02 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 5, Sec. 25, T. 35 S., R. 7½ E., 17.75 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 6, Sec. 25, T. 35 S., R. 7½ E., 18.03 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 7, Sec. 25, T. 35 S., R. 7½ E., 16.98 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 8, Sec. 25, T. 35 S., R. 7½ E., 19.32 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 9, Sec. 25, T. 35 S., R. 7½ E., 27.66 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 10, Sec. 25, T. 35 S., R. 7½ E., 33.85 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 11, Sec. 25, T. 35 S., R. 7½ E., 25.90 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 12, Sec. 25, T. 35 S., R. 7½ E., 30.52 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 13, Sec. 25, T. 35 S., R. 7½ E., 23.67 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 14, Sec. 25, T. 35 S., R. 7½ E., 22.25 acres; Geo. Mercer and W. H. Byars, affiants.

E. ½, Sec. 25, T. 35 S., R. 7½ E., 320.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 1, Sec. 26, T. 35 S., R. 7½ E., 45.71 acres, Geo. Mercer and W. H. Byars, affiants.

Lot 2, Sec. 26, T. 35 S., R. 7½ E., 49.05 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 3, Sec. 26, T. 35 S., R. 7½ E., 26.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 4, Sec. 26, T. 35 S., R. 7½ E., 7.98 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 5, Sec. 26, T. 35 S., R. 7½ E., 35.79 acres; Geo. Mercer and W. H. Byars, affiants.

S. E. ¼, S. W. ¼, Sec. 26, T. 35 S., R. 7½ E., 40.00 acres; Geo. Mercer and W. H. Byars, affiants.

S. ½, S. E. ¼, Sec. 26, T. 35 S., R. 7½ E., 80.00 acres; Geo. Mercer and W. H. Byars, affiants.

S. ½, S. W. ¼, Sec. 26, T. 35 S., R. 7½ E., 80.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 1, Sec. 27, T. 35 S., R. 7½ E., 18.34 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 1, Sec. 7, T. 36 S., R. 7 E., 40.14 acres, Geo. Mercer and W. H. Byars, affiants.

Lot 2, Sec. 7, T. 36 S., R. 7 E., 40.14 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 3, Sec. 7, T. 36 S., R. 7 E., 22.53 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 4, Sec. 7, T. 36 S., R. 7 E., 31.75 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 5, Sec. 7, T. 36 S., R. 7 E., 22.20 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 6, Sec. 7, T. 36 S., R. 7 E., 16.79 acres; Geo. Mercer and W. H. Byars, affiants.

N. ½, N. E. ¼, Sec. 7, T. 36 S., R. 7 E., 80.00 acres; Geo. Mercer and W. H. Byars, affiants.

N. E. ¼ N. W. ¼ Sec. 7, T. 36 S., R. 7 E., 40.00 acres; Geo. Mercer and W. H. Byars, affiants.

N. E. ¼, Sec. 8, T. 36 S., R. 7 E., 160.00 acres; Geo. Mercer and W. H. Byars, affiants.

N. ½, N. W. ¼, Sec. 8, T. 36 S., R. 7 E., 80.00 acres; Geo. Mercer and W. H. Byars, affiants.

N. E. ¼ S. E. ¼ Sec. 8, T. 36 S., R. 7 E., 40.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 1, Sec. 8, T. 36 S., R. 7 E., 17.74 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 2, Sec. 8, T. 36 S., R. 7 E., 31.01 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 3, Sec. 8, T. 36 S., R. 7 E., 43.43 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 4, Sec. 8, T. 36 S., R. 7 E., 19.07 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 5, Sec. 8, T. 36 S., R. 7 E., 39.34 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 1, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 2, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 3, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 4, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 5, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 6, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 7, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 8, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 9, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 10, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 11, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo Mercer and W. H. Byars, affiants.

Lot 12, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 13, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 14, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 15, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 16, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 17, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 18, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 19, Sec. 9., T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 20, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 21, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 22, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 23, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 24, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 25, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 26, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 27, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 28, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 29, Sec. 9, T. 36 S., R. 7 E. ,20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 30, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 31, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 32, Sec. 9, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 3, Sec. 10, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 4, Sec. 10, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 5, Sec. 10, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 6, Sec. 10, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 11, Sec. 10, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 12, Sec. 10, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 13, Sec. 10, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 14, Sec. 10, T. 30 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 19, Sec. 10, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 20, Sec. 10, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 21, Sec. 10, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 27, Sec. 10, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 28, Sec. 10, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 29, Sec. 10, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 30, Sec. 10, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 3, Sec. 15, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 4, Sec. 15, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 5, Sec. 15, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 6, Sec. 15, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 11, Sec. 15, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 12, Sec. 15, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 13, Sec. 15, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 14, Sec. 15, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 19, Sec. 15, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 20, Sec. 15, T. 36 S., R. 7 E., 20.00 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 21, Sec. 15, T. 36 S., R. 7 E., 12.34 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 22, Sec. 15, T. 36 S., R. 7 E., 19.60 acres; Geo. Mercer and W. H. Byars, affiants.

Lot 1, Sec. 17, T. 36 S., R. 7 E., 19.53 acres; Geo. Mercer and W. H. Byars, affiants.

Remarks.

Office of the U. S. Surveyor General,
Portland, Oregon, November 17, 1902.

I, Henry Meldrum, U. S. Surveyor General, for Oregon, do hereby certify that satisfactory evidence has been presented to me by the State authority, showing that the within described lands in T. 29 S., R. 9 E.; 30 S., 10 E.; 31 S., 7 E.; 31 S., 13 E.; 31 S., 8 E.; 30 S., 8 E.; 30 S., 8 E.; 30 S., 9 E.; 31 S., 11 E.; 31 S., 9 E.; 36 S., 7½ E.; 34 S., 7½ E.; 33 S., 7½ E.; 31 S., 10 E.; 32 S., 8 E.; 32 S., 9 E.; 35 S., 13 E.; 35 S., 7 E.; 35 S., 7½ E.; 36 S., 7 E.; all in Klamath Indian Reservation, State of Oregon, were at the time of passage of the Swamp Land Act of Congress, extended to the State of Oregon, March 12, 1860, of such a swampy and overflowed char-

acter, as to render them unfit for cultivation, under the meaning of said act.

Witness my hand and official seal hereunto affixed the date above written.

HENRY MELDRUM,
U. S. Surveyor General.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

Original No. 16.

THE STATE OF OREGON, *Complainant*,
v.
ETHAN A. HITCHCOCK, Secretary of the Interior, and
WILLIAM A. RICHARDS, Commissioner of the General Land Office, *Defendants.*
} *In Equity.*

DEMURRER OF DEFENDANTS.

IN THE SUPREME COURT OF THE UNITED STATES.

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WILLIAM A. RICHARDS, Commissioner of the General Land Office, *Defendants.*
In Equity.

DEMURRER OF DEFENDANTS.

These defendants, Ethan A. Hitchcock, as Secretary of the Interior, and William A. Richards, as Commissioner of the General Land Office, not confessing all or any of the matters and things in the complainant's bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, do demur to said bill, and for causes of demurrer showeth:

First. That this court has no jurisdiction of either the parties to this suit, or the subject-matter thereof, because it appears on the face of said bill of complaint that the matters set forth therein do not constitute, within the meaning of section 2, Article III of the Constitution of the United States, a controversy such as confers upon this court original jurisdiction.

Second. Because it appears from the allegations in said bill that the issues presented thereby do not arise between the State of Oregon and the United States, nor between said State and said defendants, or either of them, but arise, if at all, between said State and the Indians residing on the Klamath Reservation, who are not made parties herein, and which allegations, if true, do not concern the United States, nor the defendants, or either of them.

Third. That the State of Oregon has not, and never had, any title, interest, or claim in or to the lands which are the subject-matter of the action, for the reason, as stated in the bill, that said lands at the time of the passage of the swamp land act of March 12, 1860, were unceded Indian lands in the possession of and occupied by the Klamath, Modoc, and Yahooskin tribes or bands of Indians, which possession and occupancy were recognized in and guaranteed to them by the act of Congress of August 14, 1848 (9 Stat., 322), and are yet unextinguished.

Fourth. That the court has not jurisdiction of this case, because it appears on the face of the bill that the lands claimed by the complainant are burdened with a right of occupancy in the Klamath, Modoc, and Yahooskin tribes or bands of Indians.

Fifth. Because it appears from the allegations in the bill that there are divers other persons who are necessary parties to the said bill, but who are not

made parties thereto, and who are materially interested in the subject-matter of the action, and who would be injuriously affected if the relief prayed for was granted—namely, those Indians to whom have been allotted 55,281.84 acres of the lands involved.

Sixth. That the court is without jurisdiction because it appears on the face of the bill that the Indians residing on the lands in controversy are necessary parties to a final determination of the action.

Seventh. Because it appears on the face of the bill that persons materially interested in the subject-matter of the action are not made parties thereto, the same being residents and citizens of the State of Oregon, and also citizens of the United States, and without whose presence a court, acting as a court of equity, could not proceed; and who can not properly be made parties to this proceeding.

Eighth. Because on the face of the bill it appears that the acts complained of against these defendants and the acts sought to be enjoined are such as are exclusively within the jurisdiction of the Interior Department of the United States Government—are judicial and not ministerial in character—and are not subject to control, interference, or review by the Judiciary Department in injunction proceedings.

Ninth. Because on the face of the bill it appears that there has not been an adjudication by the

defendants, or either of them, to the effect that the lands involved were, on March 12, 1860, swamp and overflowed lands, within the meaning of the first section of the act of September 28, 1850, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits."

Tenth. Because the said bill is exhibited against these defendants for several distinct and independent matters and causes which have no relation to each other and in which or in the greater part of which these defendants are not interested or concerned, nor is either of them.

Eleventh. Because, as appears on the face of the bill, the purpose of this suit is to recover certain real property in the State of Oregon, hence the cause of action is legal, not equitable, and this court, sitting as a court of equity, is without jurisdiction to hear and determine the controversy; and if any right complainant has to said real property it must be asserted, if at all, in a court of law.

Twelfth. Because it appears on the face of the bill that complainant is not entitled to the relief prayed for, or to any relief against these defendants or either of them.

Thirteenth. That said bill is in other respects uncertain, informal, and insufficient, and does not state facts sufficient to entitle the State of Oregon to any relief.

WHEREFORE, These defendants humbly demand

the judgment of this court whether they, or either of them, shall be compelled to make any further answer to the said bill of complaint and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

FRANK L. CAMPBELL,
Assistant Attorney-General for the Interior Department,
Solicitor and Counsel for Defendants.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

FRANK L. CAMPBELL,
Assistant Attorney-General, Interior Department.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905

THE STATE OF OREGON, *Complainant,* *vs.* ETHAN A. HITCHCOCK, *Secretary of the Interior,* *and* WILLIAM A. RICHARDS, *Commissioner of the General Land Office.*	Original. No. 16. In Equity.

On Demurrer of Defendants to the Original Bill

Brief and Argument for Complainant

STATEMENT.

This is a bill in equity, brought within the original jurisdiction of the Court by the State of Oregon, as complainant, to restrain the defendants, the Secretary of the Interior and the Commissioner of the General Land Office, from taking certain official action,

threatened by the said defendants, to the prejudice of the State's title to certain tracts claimed by the State under the grant to the State of swamp lands.

As demurrer is filed by defendants, admitting the averments of the bill, the facts may be stated as alleged in the bill.

The defendant, Ethan A. Hitchcock, is a citizen of the State of Missouri, and is the Secretary of the Interior. The defendant, William A. Richards, is a citizen of the State of Wyoming, and is the Commissioner of the General Land Office.

The State of Oregon was admitted to the Union on February 14, 1859, by an Act of Congress approved on that date and declaring that the said State should be admitted on an equal footing with the other States in all respects.

On March 12, 1860, an Act of Congress was approved and became a law, by which a grant was made to the State of Oregon of all the public land of the United States lying within the territorial limits of the said State which was swamp and overflowed and made thereby unfit for cultivation. This statute is set out at page 3 of the bill, and the precedent Act of September 28, 1850, to which the grant to Oregon refers and which it adopts, is set out at page 2.

At the date of the grant of 1860, a large region in the State of Oregon, described by boundaries in the bill (p. 4), was public land of the United States and subject to grant, no part of the said region being reserved or dedicated to any public use, or sold or bargained to be sold or otherwise encumbered or disposed of, and all the lands in the said region were quite free of any claim other than that of the United States excepting a certain right to temporary use and possession belonging to the Indians inhabiting the region.

These Indians, being of the Klamath, Modoc and Yahooskin tribes, were not more than 1,500 in number, and were in a state of primitive savagery. They were of nomadic habits, having no fixed places of abode, but roaming at will throughout the region mentioned. They occupied and inhabited the country in the same manner and by the same kind of tenure in which and by which their ancestors had held the region from time immemorial and as all the aboriginal inhabitants of the present territory of the United States occupied and inhabited that territory before the settlement of white men therein, that is to say, by what is known and judicially recognized as aboriginal tenure. This tenure was no more than a mere right and license of present and temporary occupancy, by the sufferance of the United States, subject to the control, and terminable at the will, of the United States, there being in the Indians no power to alienate or encumber the title to any of said lands, and their present inhabitancy being only in pursuance of a provisional policy of the United States which contemplated the ultimate extinction of the Indian right of possession and the ultimate reclamation of the lands to the complete control of the Government (pp. 5, 6, 7).

No reservation for any purpose of the said lands, or any part of them, had, on March 12, 1860, been created, defined, made or declared, nor had any attempt or initial step toward the reservation of any land in the region mentioned been made or taken, by any Act of Congress, treaty, Executive order or by any other act, order, declaration, agreement or other action taken by or under the authority of any statute, treaty, or officer of the United States; nor had any other act been done or step taken by or on behalf of the United States or any officer of the United States which in any way effected or attempted

to effect any change whatever in the original condition of these lands or in the aboriginal tenure by which the Indians had always held them (p. 7).

Within the region mentioned were numerous tracts, of considerable area, which were, on March 12, 1860, swamp and overflowed lands, and thereby rendered unfit for cultivation, and of the character defined and intended by the Act of Congress approved on the said date; and it is averred that all such tracts, being by reason of the premises subject to grant by the United States and within the terms of the said Act of Congress, were by the said Act granted to the State, and became and have since been the property of the State, the title of the State therein being subject only to the right of temporary occupancy existing in the then Indian inhabitants thereof (pp. 12, 13).

More than four and a half years after the date of the swamp land grant, that is to say on October 14, 1864, the first action was taken which in any way affected the status of this region in respect of the Indian tenure and right of occupancy. On that date was concluded a treaty between the United States and the three tribes which had theretofore inhabited the whole body of lands described in the bill, by the terms of which the Indians ceded to the United States the greater part of the said region and, for certain considerations moving from the Government, agreed to limit their future residence and occupation to a certain defined district which was within the boundaries of the country which they had theretofore occupied as a whole (pp. 7, 8). The language of the treaty provisions on this point is as follows:

> "That the following described tract, within the country ceded by this treaty, shall, until otherwise directed by the President of the United

States, be set apart as a residence for the said Indians and held and regarded as an Indian reservation, to-wit; Beginning, &c., &c. * * *

"And the tribes aforesaid agree and bind themselves that, immediately after the ratification of this treaty, they will remove to the said reservation and remain thereon, unless temporary leave of absence be granted to them by the superintendent or agent having charge of the tribes." (p. 9).

Further stipulations of the treaty excluded from the reservation so provided for all white persons except certain officials, and secured to the Indians the exclusive right of fishing and gathering edible roots, seeds and berries within the reservation limits (p. 10).

Since the conclusion of the treaty of 1864, the body of lands thereby set apart as a place of residence for the Indians has been by them occupied, and has been known as the Klamath Indian Reservation, and administered by the officers of the United States as an Indian reservation. Until the year 1899, or thereabout, the manner and character of the Indian occupancy of this tract did not materially differ from the manner and character of their former occupancy or of aboriginal inhabitancy generally. There was no assertion or claim, on the part of the Indians, or of any one for them, or of the officers of the United States, that the tribes or any individual members thereof had or were to have any other, or more valid or stable, title to any part of the land included in the reservation; nor was there any such change in the manner of the Indian holding as to cause, or to suggest, or to give promise of, any alteration of the original tenure by which the lands were occupied or of any more permanent title than that under which

possession had from time immemorial been held; nor had any officers of the United States, in behalf either of the United States or of the Indians, taken any action contemplating or tending toward the giving to any of the Indians any ultimate title or right to perpetual possession in any of the reservation lands (pp. 10, 11).

In or about the year 1899, however, the defendant Ethan A. Hitchcock, being then as now the Secretary of the Interior, directed a large portion of the Klamath Reservation to be surveyed and divided into lots for the purpose of making allotments of the reservation lands to individual members of the tribes, and with the ulterior purpose, as avowed by the Secretary, of patenting the tracts so allotted to the Indians in severalty. This action was taken, and the further action contemplated was proposed, in professed accordance with the Indian Allotment Act of February 8, 1887, (the date being in the bill, p. 12, by clerical error stated as February 12), which Act authorizes allotment to Indians in severalty, the issue of patents declaring that the United States holds the allotted lands in trust for the respective allottees, and, after twenty-five years, the conveyance by further patents of the fee simple to the individual Indians (24 Stat. at L., 388; 1 Supp. Rev. St., 534).

In pursuance of this policy announced by the Secretary, and under the direction of the defendant William A. Richards, as Commissioner of the General Land Office, a large portion of the lands included in the Klamath Indian Reservation has been surveyed and allotments have been made therefrom to divers individual members of the Indian tribes settled upon the reservation. At the date of the institution of the present suit, however, no patents had been issued to any of these allottees, or to any one else, for any of such lands (p. 28).

On March 12, 1860, many tracts of land, within the districts which, by the subsequent treaty of 1864, was constituted a reservation for the Indians, were swamp and overflowed land of the character granted to the State of Oregon by the Act of the former date. Pending the recent survey and allotment of the reservation lands stated to have been made under the authority of Secretary Hitchcock, the State caused an examination to be made of the reserved region, for the purpose of ascertaining what tracts included therein were within the terms of the swamp land grant, with a view to asserting her claim under the grant. The result was the discovery of 92378.09 acres which were swampy in character and had been so in 1860. Of this area, tracts amounting to 55281.84 acres were included in the Departmental policy of allotment, and were occupied by individual Indians with a view to obtaining patents under the Act of 1887 (pp. 13, 14, 15).

The bill avers that, by reason of the premises and in virtue of the Act of March 12, 1860, these lands were granted to the State as of that date and are the property of the State, subject only to the temporary and terminable right of occupancy existing in the Indians (pp. 12, 13, 16).

In 1902, the State asserted her claim to the swamp lands in the Klamath Reservation by preparing and presenting to the Department of the Interior a list of such lands, which became and is known in the Department as List No. 82, together with proper proof as to the character of the lands in 1860. This list, and the evidence in support of the State's claim, were, in accordance with the rules and the practice obtaining in the Department, presented in the first instance to the United States Surveyor General for Oregon for his official examination and judgment. That officer, finding the evidence sufficient to establish the swampy character of all the tracts of the date of the

grant, attached to the list a certificate to that effect, and forwarded the list so certified and the proof to the General Land Office for the action of the Commissioner (pp. 14, 92).

The action of the General Land Office was announced in a decision written and signed by the Assistant Commissioner, Mr. Fimple, acting as Commissioner in the absence and with the approval of Commissioner Richards. This decision, dated November 18, 1903, is set out at pp. 18 *et seq.* of the bill. In this letter, Mr. Fimple holds that the actual swampy character of the lands at the date of the swamp land grant of 1860 is immaterial, because the lands were, at the date of that grant, occupied by Indians and therefore not subject to be granted (p. 19).

From this decision, the State appealed to the Secretary of the Interior, one of the present defendants. On May 26, 1904, Assistant Secretary Ryan, as Acting Secretary of the Interior, by the authority and with the approval of Secretary Hitchcock, affirmed the action of the General Land Office, and rejected the claim of the State to all the swamp lands within the Klamath Reservation. This decision is set out in the bill at pp. 23 *et seq.*

A motion for review of this decision, filed by the State, was overruled, and the Departmental refusal to allow the lands to the State was made final in September, 1904 (p. 27). Since that date, the defendants, in their respective official capacities, have approved and acted upon the doctrine and conclusion expressed in these decisions. They refuse to recognize the right of the State in the swampy lands of the Klamath Reservation, or even to approve or disapprove the Surveyor General's finding that the tracts listed in List No. 82 are of that character. And they announce a purpose to proceed to allot such lands and to issue therefor to individual Indians such

patents as are authorized by the Act of February 8, 1887, the effect of which is ultimately to convey to the Indians the legal title to the tracts allotted (pp. 28, 29).

The Klamath Reservation covers an area of more than 872000 acres, of which there remains, after deducting the swamp lands listed by the State, nearly 780000 acres. The total number of Indians settled upon the reservation is less than 1200. If every Indian, including men, women and children, should be allotted 160 acres, there would be a surplus area within the reservation, exclusive of the swamp lands, amounting to not much less than 600000 acres (p. 29).

The present bill sets out the foregoing facts and avers that the patenting of the swamp lands which is threatened by the defendants will cloud, impair and jeopardize the title of the State to those lands, will unduly and wrongfully postpone the State's possession and enjoyment of them, will facilitate and encourage waste on the part of the patentees to the prejudice of the State, and will necessitate a multiplicity of suits in order to vindicate the rights of the State in the premises (p. 29). It is prayed:

First: That the defendants be enjoined and restrained from issuing patents for any of the lands in the Klamath Reservation which are listed and claimed by the State as swamp lands until and unless it is duly ascertained and adjudicated by the Department that such lands were not in fact of that character on March 12, 1860; and, Second: That the decree of this Court will declare that all the tracts in the said reservation which, on the said date, were swamp and overflowed lands, passed to and became the property of the State of Oregon upon the passage of the Act of Congress approved on that date, and that the title so acquired by the State is subject only

to such right of temporary and terminable occupation in said lands as may belong to the Indian inhabitants thereof by reason of their aboriginal tenure.

Demurrer to this bill proceeds substantially upon these grounds:

That the case stated by the bill is not within the original jurisdiction of this Court;

That there is a defect of parties in that the Indian allottees mentioned in the bill are not made defendants;

That the State is not entitled to the lands under the swamp land grant; and

That the case is not a proper one for injunction because the legal title to the lands is still in the United States and subject to the control of the Interior Department.

ARGUMENT.

I.

THE JURISDICTION OF THE COURT.

The objection taken by the demurrer to the jurisdiction of the Court seems to be met by the decision in the recent case of Minnesota *vs.* Hitchcock, 185 U. S. 373.

In that case, as in this, one of the States of the Union brought a bill within the original jurisdiction of this Court against the Secretary of the Interior and the Commissioner of the General Land Office to restrain those defendants from taking certain official action to the prejudice of the State's title in certain lands claimed under a grant from the United States. Although neither party raised the question of jurisdiction, and both seemed desirous to ignore it, the Court felt bound of its own motion to consider the

question, on the ground that consent of the parties cannot confer upon any court jurisdiction which is not given by law over the subject matter. The conclusion reached was that the case was within the original jurisdiction of this Court because the controversy was one to which the United States might be regarded as a party. In reaching this conclusion, the Court observed:

> "Now the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to devest the government of its title and vest it in the State. The United States is therefore the real party affected by the judgment and against which it will in fact operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a State is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to the controversy is not determined by the merely nominal party on the record, but by the question of the effect of the judgment or decree which can be entered."

All the circumstances stated in this passage as constituting the interest of the United States in that case exist in the present. Unless, therefore, this case differs in some other and some material respect from that of Minnesota *vs.* Hitchcock, the jurisdiction of this Court must be regarded as settled.

Distinction between the two cases will doubtless

be sought to be raised upon the ground that, in that of Minnesota, a special statute, apparently applicable only to that kind of a suit, was regarded by the Court as expressing the consent of the United States to be made a party defendant to that action. And it may be urged that, in the absence of such an express consent on the part of the Government to be sued, such a suit as this can not be maintained.

The statute cited in Minnesota *vs.* Hitchcock, which was approved on March 2, 1901, provided that, in any suit, brought in the Supreme Court of the United States by any State to establish the rights of the State in respect to school lands against any Indian tribe claiming such lands, it should not be necessary to make the tribe a party, but the suit should be defended by the Attorney General of the United States.

The primary purpose of this Act was, manifestly, to dispense with the possible or supposed necessity of making the Indians defendants to the proposed suit, a thing which would be highly inconvenient and perhaps impossible, and which would defeat the original jurisdiction of the Court. The consent of the Government to be sued was merely incidental to this purpose and was given only by inference from the substantial provisions of the statute.

While some such provision may have been, under the particular circumstances of the Minnesota case, necessary to enable such a suit to be maintained against the United States, there is nothing in the case or in the opinion of the Court which suggests that express consent of the Government is requisite in all cases to which the United States may be regarded as a party. On the contrary, as the Court takes some pains to point out, the necessity of such a statute in Minnesota *vs.* Hitchcock was occasioned, not by the immunity of the Government from suit, but by the

fact that, without that enactment, the Government could not have been a party at all.

The lands involved in that case were originally the property of the Indians, and had been ceded to the United States in trust to sell the lands and apply the proceeds to the benefit of the Indians. The real ownership being in the Indians, and the United States being altogether without beneficial interest in the subject matter, it was doubtful whether the United States was a proper party to the cause, and it was clearly impossible to try the merits of the controversy upon a bill against the United States alone. It was this difficulty which dictated resort to legislation; and the purpose of the Act of March 2, 1901, was that the Government should assume the position of defendant in the place of the real parties in interest and should undertake to defend the rights of the Indians. The Court, in stating the purpose and effect of the Act, says:

> "But it may be said that the United States has no substantial interest in the lands; that it holds the legal title under a contract with the Indians and for their benefit. This is undoubtedly true; and, if the case stood alone upon the construction of the treaty between the United States and the Indians, there might be substantial force in the suggestion. But Congress has, for the Government, assumed a personal responsibility. On March 2, 1901, it passed the following act: &c., &c."

It was, therefore, the absence of interest on the part of the United States which made the statute necessary and not the general immunity of the Government from suit. The act was cited and relied upon by the Court, not as a prerequisite consent of the Government to be made a party defendant, but as an

assumption of liability by which alone the Government could become a party at all, and which was necessary in order to enable the United States to defend the rights of the Indians through its law officers.

In the present case, no similar necessity exists for such a creation of an interest in the Government. Whatever title to the lands is in the United States is held by the Government, or is assumed by the officers of the Government to be held, for its own benefit, and not at all in the execution of any trust or other obligations to the Indians or to any one else. There are no stipulations or statutes which make it necessary to convey these lands to the Indians or to administer the reservation in their interest. The Secretary might, if he chose, cancel every allotment heretofore made, and refuse to admit the settlement of any Indian or other person upon any of the allotted tracts, and no faith would be broken, nor could any Indian object or complain. The only possible title or claim to the lands, other than the title of the United States, is the title of the State under swamp land grant which it is the object of this suit to protect. Under such circumstances, there is no need of a statute to establish in the United States such an interest as will constitute it a party to the present controversy.

Nor is a statute or other express warrant necessary to enable a suit thus affecting the interest of the Government to be maintained against its officers. The immunity of the sovereign from suit does not extend to those who act for it; and the concern of the sovereign in the subject-matter of a controversy does not preclude the jurisdiction of the courts. While the State may not be directly sued, the acts of those who assume to act for the State may be examined, and such acts may be enjoined even when taken or proposed to be taken by direct authori-

zation of the sovereign. Even the fact that the State has the entire ultimate interest in the controversy, and is solely to be affected by the judgment, does not prevent the maintenance of the action against the proper officers of the State:

Osborn *vs.* United States Bank, 9 Wheaton, 738.
United States *vs.* Peters, 5 Cranch, 115.
Davis *vs.* Gray, 16 Wall., 203.
Allen *vs.* R. R. Co., 114 U. S., 311.
Board of Liquidation *vs.* McComb, 92 U. S., 531.
Hagood *vs.* Southern, 117 U. S., 52.
In re Ayres, 123 U. S., 443.
Pennoyer *vs.* McConnaughy, 140 U. S., 1.
Rolston *vs.* Crittenden, 120 U. S., 390.
Reagan *vs.* Loan and Trust Co., 154 U. S., 362.
Ex parte Tyler, 149 U. S., 164.

These cases, to which many others might be added, establish the principle, that, while no suit will lie to compel either a State or its officers to affirmative action in public affairs, the officers may be restrained from the execution of any laws or policy of the State which unlawfully affect the rights of individuals.

Suits against the United States, that is to say, suits which affect the interest and concern the property of the United States, are within the same principle. Where a Federal officer is made defendant, it is no objection to the jurisdiction that the controversy involves the property or otherwise concerns the interest of the United States; nor is it necessary, the case being of the character in which a State officer might be sued, that the Government should consent to the suit being brought:

United States *vs.* Lee, 106 U. S., 196.
Meigs *vs.* McClung, 9 Cranch, 11.

Grisar *vs.* McDowell, 6 Wall., 363.
Brown *vs.* Huger, 21 How., 305.
United States *vs.* Schurz, 102 U. S., 378.
Noble *vs.* Logging Co., 147 U. S., 165.

In each of the first four of these cases the defendant was an officer of the United States in possession of the property sued for as such officer and claiming the property only on behalf of the United States; and in the first two cases, the plaintiff, asserting a title adverse to that of the United States, recovered possession upon consideration of the merits.

The present case is one in which the United States is in possession of the lands, which the officers of the United States assert to be the property of the Government and assume to dispose of as such. The State claims that the lands belong to her and seeks to prevent the Federal officers from diverting the property to Federal purposes. The controversy is, therefore, upon the authority of Minnesota *vs.* Hitchcock, one between the State and the United States, and, because of the interest of the United States, within the Federal jurisdiction. The situation so far as respects the relations of the parties to the subject matter and to each other, is precisely that presented in several of the cases last cited, in which officers of the United States in possession of property claimed by and on behalf of the United States were sued by adverse claimants of the property, and the suits were held to be maintainable, notwithstanding that the United States was the real defendant, and without any formal consent of the Government to be sued. The only difference is that here the adverse claimant is a State instead of an individual, which fact brings the case within the original jurisdiction of this Court. It is the same kind of a case as would have been that of the United States *vs.* Lee had the State of Virginia,

instead of Mr. Lee, been the plaintiff. It is accordingly submitted that, as held in Minnesota *vs.* Hitchcock, the cause is within the original jurisdiction as one between the State and the United States.

In addition to this ground, and independently of the authority of Minnesota *vs.* Hitchcock, there are two other grounds upon which the jurisdiction of this Court in this cause may be maintained. One of these grounds, that the suit is one between a State and citizens of other States, was pressed upon the Court in the Minnesota case, in a brief signed by counsel for complainant State and concurred in by Mr. Vandevanter, then Assistant Attorney General appearing for the defendants. The second ground, that the cause arises under the laws and a treaty of the United States, was suggested by the Court itself. Both grounds, though mentioned in the opinion, were passed over without decision as to the soundness of either, the Court preferring to rest its jurisdiction upon the interest of the United States. If it should appear that the present case is not fully controlled as to this point by the decision in Minnesota *vs.* Hitchcock, counsel for the complainant ask that these other grounds may be considered.

In the first place, this is a controversy between a State and citizens of other States. The action is brought by the State of Oregon against Mr. Hitchcock, who is a citizen of Missouri, and Mr. Richards, who is a citizen of Wyoming. On the face of the bill, the cause is within the letter of that clause of the Constitution which extends the judicial power of the United States to controversies between a State and citizens of another State; and, since a State is a party, the cause is within the original jurisdiction of this Court.

In Minnesota *vs.* Hitchcock, it was suggested as a possible objection to assuming jurisdiction upon this

ground that neither of the defendants, who were sued in the same respective official capacities as are the present defendants, had any individual interest in the controversy, their only concern in the matter being as officers of the United States, and that, should either die or resign pending the suit and his successor be a citizen of the complainant State, the jurisdiction would cease.

Inasmuch as the Court did not pass upon these objections, but left the question open, it may be said that, in cases where jurisdiction is asserted on the ground of diverse citizenship, the Federal courts look only to the citizenship of the parties named on the record, without regard to their relationship to the cause or to the citizenship of those who, though not parties, are the real parties in interest. Thus, in suits against executors, administrators, trustees, or other persons sued in representative capacities, the jurisdiction is determined by the citizenship of the actual defendant, regardlessly of the citizenship of the beneficiaries:

Childress *vs.* Emory, 8 Wheaton, 642.
Rice *vs.* Houston, 13 Wall., 66.
Bonnafee *vs.* Williams, 3 How., 574.
Dodge *vs.* Tulleys, 144 U. S., 451.
Foster's Federal Practice, (3rd ed.), Vol. 1, Sec. 19.

The same rule applies where the defendant is sued in a purely official capacity and the real interest is in the State of which he is an officer:

Davis *vs.* Gray, 16 Wall., 203.

With respect to the suggestion that the jurisdiction might be ousted if one of the defendants should, in

the progress of the suit, be succeeded by a citizen of the complainant State, the rule seems to be settled, that, if the jurisdiction is properly acquired by reason of the diverse citizenship of the original parties, it is not defeated by such a change of parties as brings citizens of the same State upon opposite sides of the record:

Foster's Federal Practice, Vol. 1, s. 19.
Stewart *vs.* Dunham, 115 U. S., 61.
Phelps *vs.* Oakes, 117 U. S., 236.
Anderson *vs.* Watt, 138 U. S., 707.
Tug River Co. *vs.* Brigel, 86 Fed. Rep., 818.

As a second additional ground of jurisdiction, it is insisted, as was suggested by the Court in Minnesota *vs.* Hitchcock, that the present cause is within that clause of the Constitution which extends the judicial power of the Federal courts "to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." In this case, the State claims the land under one of the laws of the United States, the swamp land grant of Congress, and the defendants assert their right to control and dispose of the lands as the property of the United States in virtue an Act of Congress passed in 1848, of a treaty made with the Indians in 1864, and of a statute enacted in 1887. There can be no question of the fact that the case is within the class defined in the last quoted clause of the Constitution.

Of the contention made to this effect in Minnesota *vs.* Hitchcock, the Court said, referring to this as the second ground upon it was asked to assume jurisdiction:

> "In respect to the second, it may be said that, if it were held that this Court had original jurisdiction of every case of a justiciable nature in which a State was a party and in which was presented some question arising under the Constitution, laws of the United States, or treaties made under their authority, many cases, both of a legal and an equitable nature, in respect to which Congress has provided no suitable procedure, would be brought within its cognizance. To this it may be replied that this Court can not deny its jurisdiction in a case to which it is extended by the Constitution."

It is submitted that the reply of the Court fully meets and overcomes the objection stated to the jurisdiction on this ground. As a Congress can neither enlarge nor restrict the original jurisdiction of the Court as defined by the Constitution, and the Court can neither assume nor refuse such jurisdiction except as prescribed by the Constitution, the failure of Congress to provide a procedure can not affect the power or the duty of the Court in a case falling within the class defined. At all events, whatever might be the difficulty or doubt in the possible cases suggested by the Court, there is no embarrassment in respect of procedure so far as the present action is concerned. The suit is brought in accordance with the established practice in causes within the original jurisdiction, and, as in all such cases, the procedure is directed and controlled by orders made as the controversy progresses. It would seem, therefore, that no difficulty is to be apprehended in this instance at least; and the case, being within the Constitutional description should be held within the jurisdiction of the Court.

Inasmuch as the controversy is one to which a State

is a party, it is one of original jurisdiction, whether the judicial power of the United States be held to extend to it upon either or all of the three grounds stated. And it is, for the reasons set forth, submitted that these grounds are sufficient to warrant this Court in assuming jurisdiction.

II.

THE INDIANS NOT NECESSARY PARTIES.

The second, fifth, sixth and seventh causes of demurrer proceed on the assumption that the Indians resident upon the Klamath Reservation, or those to whom allotments have been made, are necessary parties to the determination of the controversy.

It is manifestly impossible to make these Indians, individually or collectively, parties to this or to any other proceeding which shall determine the right of the Interior Department to patent these lands. The total population of the reservation is between 1100 and 1200 Indians (p. 30). The number to whom allotments have been made does not appear, nor does it seem material upon this point, since, by the Act of February 28, 1891, 26 Stat. at L., p. 794, which is an amendment of and a substitute for the original Allotment Act of 1887, all the Indian residents of the reservation are entitled to claim allotments, and all, therefore, might with equal justice be supposed entitled to defend against the claim of the State. The allotments actually made amount to 55281.84 acres (p. 15). If all the allottees were allowed 160 acres each, the maximum allowance under the Act of 1887, the number of allotments would be 345 or 346. If all have received 80 acres each, which seems to be the maximum under the Act of 1891, the allottees would be no less in number than 691. Whether the

number who should be held necessary parties is 345, or 691, or 1141, it is practically out of the question to obtain their names, to secure service upon them, and to make the necessary arrangements in the cases of those who are infants, married women, or under other disabilities.

Again, supposing this difficulty overcome, the only result would be to oust the jurisdiction of this Court and every other court. If these Indians were made parties, the suit would no longer be maintained in this Court. There are only two other courts in which such an action could be instituted, the Supreme Court of the District of Columbia and some court, State or Federal, in Oregon. In the former of these courts no jurisdiction could be obtained over the Indians; in the latter, the present defendants could not be made parties.

It would result that a controversy, of the character which this Court, in Minnesota *vs.* Hitchcock, has held to be justiciable, and one to which both the United States and a State are parties, and one arising under the laws and treaties of the United States, and one of which it is eminently desirable, on many accounts, that there should be a determination, must go undetermined for want of a proper forum to try its merits. Such a result, while not perhaps conclusive against this theory of the demurrer, ought at least to create a prepossession against such a theory.

That the assumption of the demurrer on this point is erroneous appears from several considerations.

1. In the first place, the Indians have no title or interest in the lands, nor is any title or interest claimed or asserted by them or on their behalf.

The greatest possible interest which the Indians ever had in the lands was the right of occupancy under their aboriginal tenure as it existed prior to the Treaty of 1864. This tenure, as it is stated in the

bill and as it is judicially defined, was a mere temporary and provisional occupation, at the will of the United States, subject to be determined by the United States, and intended to be determined at some time in accordance with a well understood public policy. There is clearly nothing in such a possessory right, even if it were more stable and better assured than it ever was in this instance, which would entitle the occupants of the lands to be made parties to a controversy about the title. The title was subject to be granted without consulting the Indians; and, so long as their right of occupancy is not assailed and their possession is not disturbed, they have no interest which would give them a standing to question the disposal of the ultimate fee.

The only change which has ever been made in this original possessory title, under which the Indians occupied their ancestral domain, was that made by the Treaty of 1864. The effect of this treaty was not to strengthen but to weaken the aboriginal tenure of the tribes. Whereas, before they had held a possessory title, which, though temporary in its nature, was sacred while it lasted, by the treaty they agreed to hold the limited region reserved to them at the pleasure of the President (p. 9). In this negotiation, the Indians surrendered their prescriptive right to undisturbed possession, and bound themselves to transfer their residence to some other district whenever called upon to do so. The result is that the tribes have had, since 1864, even less interest in the soil which they occupy than is, by law and custom, conceded to Indians in their original condition and in advance of treaty relations. And, neither before nor since the treaty, have they had any such title as would make them proper parties to a suit concerning the ultimate disposal of the lands.

The Indian Allotment Acts of 1887 and of 1891

do not create any new rights in the Indians, or confer upon them any interest in the lands which they occupy. It is true that these enactments contemplate a future investiture of individual Indians with the fee simple title; but they create no present interest, and they pledge nothing upon which the Indians may insist. It is altogether in the discretion of the President or of the Secretary of the Interior whether or not allotments shall be made. Even after the lands are allotted, the beneficiaries can not demand the issue of the trust patents against the judgment of the Secretary. The Allotment Acts have not even the effect of contracts, and the fact that lands have been allotted does not afford any enforcible guaranty of either present or future right to the land. Whatever these Indians have received in the premises is sheer gratuity of the Secretary, which the Secretary might have withheld, and may yet, if he chooses, withdraw. It follows that they have no such right or interest in the reservation lands as would entitle them to be made parties to a controversy respecting the ultimate fee or enable them to object to any disposal of the lands which the Court might decree. To make them parties would be a flagrant misjoinder, as drawing them into a litigation which does not at all concern them.

It should further be observed that the Indians have done nothing which implies an assertion of a claim to the lands or even a desire on their part to obtain allotments and patents. All that has been done is the action of the Secretary and the Commissioner, the present defendants, acting, so far as appears, upon their own initiative, and certainly upon their own discretion. The Indians have been merely passive in the matter, accepting as they must the disposition of their soil directed by those in authority over them. They have made no pretense of any interest in the reservation; and, since no patents have issued (p. 28), the

allottees have no color of legal or equitable title. There is, then, nothing in the case which suggests that the Indians would be even proper parties.

2. If, however, there appeared some negotiation, agreement, statute, or other transaction between the United States and the Indians, whereby the latter were assured conveyance of title to these lands, that fact would still not necessitate the joinder of the Indians as parties.

The controversy stated in the bill is between the United States and the State of Oregon. The State claims the lands in virtue of a statute which concerns only the State and the Federal Government. It appears that certain officers of the United States propose to divest the lands from the State, and that, as authority for this action, they rely upon certain statutes, a treaty, and other acts of the United States which are supposed to create an interest in the Indian tribes. But these are matters between the Government and the Indians, in which the State has no concern. She looks to the United States to make good the swamp land grant, and her title as against the Government is not affected by the fact, if it be a fact, that the Government has compromised itself by negotiations or pledges respecting the subject-matter of the grant with a third party. If that be true, it still does not shift the responsibilities or obligations of the United States, or make the present controversy one between the State and the third party. It will, therefore, not do to say, as is suggested by the second ground of demurrer, that the allegations of the bill do not concern the present defendants or the United States.

It will hardly be seriously contended that, wherever the result of a suit may affect the interest of third parties, those parties must be brought upon the record. The contrary appears from all the cases herein-

above cited in which officers of various States have been sued in respect of acts done or intended to be done on behalf of the States, and from those other cases in which officers of the States or of the United States have been made defendants in suits to recover property held by them on behalf of the States or of the United States. In none of these instances has the State or the United States been made a party.

In Davis *vs.* Gray, 16 Wall., 203, this very point was raised and expressly decided. The State of Texas had, many years before, granted a large body of the State lands to a railroad corporation, and, afterwards, had undertaken to forfeit the grant and had sold or bargained to sell parcels of the lands to individual purchasers. The suit was brought by the receiver of the corporation against the Governor and the Commissioner of Public Lands of Texas, and sought to enjoin them from thus disposing of the granted lands. Objection was made by the demurrer to the bill on the ground that the purchasers from the State should have been made defendants, on account of their interest in the result. But to this, the Court said:

> "It has been insisted that those holding adverse claims should have been brought in to the case as parties. They are too numerous for that to be done. * * * The important questions which have arisen between the appellants and the Company can all be properly determined without the presence of other parties than those before us. The parties referred to are sufficiently represented for the purposes of this litigation by the Governor and the Commissioner of the General Land Office. We feel no difficulty in disposing of the case as it is presented in the record."

In this matter, the Indians have not even the equity of purchasers. They have given nothing for the lands, and have not even, so far as appears, applied for allotments. The promises or prospect of titles in severalty is a gratuitous act on the part of Secretary Hitchcock, an act within his statutory discretion, but still entirely gratuitous. There is no obligation on the part of the Secretary to allow allotments, and no right in the Indians to demand them. Still less is there such obligation to give or such right to claim these particular swamp lands. Even if some positive requirement of law made it the duty of the Secretary to provide holdings in severalty for all the members of the tribes, he could allow to each individual the maximum area allottable and have a surplus of nearly 600,000 acres, without taking an acre that is claimed by the State (p. 30). Whatever, therefore, is allotted, and especially every allotment of swamp land, is simply a gratuity offered to the Indian, without the shadow of a right or legal claim on his part.

The Indians being thus the merest volunteers in the premises, their relation to this cause is no other than that of legatees or next of kin to a bill against the personal representative to establish a debt against the estate of the decedent. Of such persons, it is justly observed that they, as well as creditors, are concerned that the sufficiency of the estate to meet their claims shall not be diminished; but it is well settled that such interest does not entitle them to be made parties:

Adams, Doctrine of Equity, pp. 315, 316.

In a case where complainant sued, as the State sues here, for the specific performance of a contract for title, it appeared that he had assigned an interest in the contract to his brother, and it was objected, on

this account, that the brother should have been made a party plaintiff. To this the Court said:

> "The transfer by the complainant to his brother of one half interest in the lease . . . . in no respect affects the obligation of the defendant, or impairs the right of the complainant to the enforcement of the contract. The owners of partial interests in contracts for land, acquired subsequent to their execution, are not necessary parties to bills for their enforcement. The original parties on one side are not to be mixed up in controversies between the parties on the other side in which they have no concern."

Willard *vs.* Tayloe, 8 Wall., 557.

3. Even if the rule were that, generally, persons should be made parties who stand in relation to a controversy as these Indians stand to the present cause, such rule would not apply to Indians in such a case as this.

That the Indians are wards of the Nation, and that the United States, acting through the Secretary of the Interior, is their guardian, has been declared by the courts so often and in so many applications as to have become a settled principle of Federal law and Federal practice:

Cherokee Nation *vs.* Georgia, 5 Peters, 1.
Worcester *vs.* Georgia, 6 Peters, 515.
Elk *vs.* Wilkins, 112 U. S., 94.
United States *vs.* Kagama, 118 U. S., 375.
Cherokee Nation *vs.* Railway Co., 135 U. S., 641.
Jones *vs.* Meehan, 175 U. S., 1.
Barker *vs.* Harvey, 181 U. S., 492.

This dependent relation of the Indian, and this guardianship of the Government, are not destroyed or materially altered by allotments of land in severalty or even by admission to citizenship:

United States *vs.* Flournoy Stock Co., 71 Fed. Rep., 576.
Eells *vs.* Ross, 64 Fed. Rep., 417.
Smythe *vs.* Henry, 41 Fed. Rep., 705.

From this relationship it results that the Indian or the Indian tribe may be properly represented by the Secretary of the Interior as the guardian of Indian rights and the representative of Indian interests.

4. Still assuming, contrary to what appears to be the fact, that the Indians mentioned in the bill have such interest in the subject-matter as entitles them to be represented in this cause, the case is further within the rule, that a trustee may sue or be sued, without his beneficiary, if the trust is of such a nature as to warrant the construction that the trustee has been authorized to appear for the beneficiary:

Kerrison *vs.* Stewart, 93 U. S., 155.

In accordance with this rule, it is held that the beneficiary is not a necessary party to a suit against a trustee to enforce a trust:

Shaw *vs.* Railroad Co., 5 Gray, 171.
Campbell *vs.* Railroad Co., 1 Woods, 376.
Ashton *vs.* Atlantic Bank, 3 Allen, 220.

Nor is the beneficiary a necessary party to a suit brought against the trustee to defeat the trust in part or altogether:

Vetterlein *vs.* Barnes, 124 U. S., 168.
Rogers *vs.* Rogers, 3 Paige, 379.
Sears *vs.* Hardy, 120 Mass., 524.
Campbell *vs.* Watson, 8 Ohio, 500.

In Vetterlein *vs.* Barnes, *supra*, this Court quoted with approval this statement of the rule as laid down in Rogers *vs.* Rogers, *supra:*

> "As a general rule cestuis que trust, as well as the trustee, must be parties, especially where the object is to enforce a claim consistent with the validity of the trust. But where the complainant claims in opposition to the assignment or deed of trust, and seeks to set aside the same on the ground that it is fraudulent and void, he is at liberty to proceed against the fraudulent assignee or trustee, who is the holder of the legal estate in the property, without joining the cestui que trust."

In this case, as appears from the decision of Secretary Hitchcock (pp. 23 *et seq.*), the Government claims to hold the legal title to the lands in trust for the discharge of certain treaty and statutory obligations to the Indians. It is only by reason and on account of those supposed obligations to the Indians that the right of the State to the lands is denied. More than this, it is the purpose of the Secretary, upon completion of the allotments, to deliver to the allottees patents formally and expressly declaring that the United States holds the several tracts in trust to convey legal titles at the end of twenty-five years (pp. 11, 12, 28, 29). If the defendants are correct in their understanding of the treaty and the statutes upon which they rely, the Government is nothing else than a trustee for the Indians; and if they are justi-

fied in declaring the trust in the patents, they would not be justified in denying in this proceeding that the trust exists. The sole purpose of the bill is to destroy altogether the supposed trust. And to such a bill, upon the authorities cited, the Indians on whose behalf the trust is set up are not necessary defendants.

On these several accounts, it is submitted that the demurrer should be overruled so far as it proceeds upon the suggestion of a defect of parties.

III.

THE LANDS SUBJECT TO THE SWAMP LAND GRANT.

The Act of March 12, 1860, enacts:

> "That the provisions of the Act of Congress entitled, 'An Act to enable the State of Arkansas and other State to reclaim the swamp lands within their limits,' approved September 28, 1850, by the same are hereby extended to the States of Minnesota and Oregon; Provided, That the grant hereby made shall not include any lands which the Government of the United States may have reserved, sold or disposed of (in pursuance of any law heretofore enacted), prior to the confirmation of title to be made under the authority of this Act."

The Act of 1850 referred to and adopted by this statute was a grant to the respective States therein specified of all the public lands within those States being swamp and overflowed and rendered thereby unfit for cultivation. This Act, and the Act of 1860 above set out, have been uniformly construed as making present grants of the lands described therein, and as passing to the respective grantee States an immediate title from the date of the grants.

The lands which form the subject of the present

controversy were swamp and overflowed, and thereby rendered unfit for cultivation, at the date of the Act of March 12, 1860, this fact being directly averred in the bill (p. 16), and admitted by the demurrer.

The same fact is found by the United States Surveyor General for Oregon, to whom the claim of the State was presented for action in the first instance, and whose duty it was to pass upon the sufficiency of the proof adduced in support of that claim (pp. 14, 92). The Commissioner of the General Land Office and the Secretary of the Interior, in acting upon the case, do not question the correctness of the Surveyor General's finding, but hold the fact of swampy character to be immaterial (pp. 18, 23).

Unless, therefore, the lands mentioned in the bill are within some of the exceptions from the swamp land grant, it must be held that they passed under that grant and have been the property of the State since March 12, 1860.

The Indian occupancy, in 1860, of the region in which these lands lay was not of such character as to defeat the operation of the swamp land grant. As is stated in the bill and admitted by the demurrer, the Indians had no title except the aboriginal tenure and right of occupancy which has been, by all the political and judicial authorities of the United States, conceded to the original inhabitants of all the present territory of the Union. This right was, in the language of the bill:

> "No more or other than a mere right and license of present and temporary use, occupancy and possession of the said lands, by the sufferance and at the will of the United States, there being in the said Indians no right or power to alienate the said lands or to convey their right to the possession thereof except to the United

States, or to encumber the title to the said lands in any way, the ultimate title and fee simple in and to the said lands being in the United States and subject to be granted by the United States, and the present use, occupancy and inhabitancy of the said lands being in pursuance of a merely temporary and provisional policy of the United States, in accordance with which policy such use, occupancy and inhabitancy might at any time be terminated by the United States, and which policy contemplated that such use, occupancy and inhabitancy should and would be terminated by the United States at some time" (p. 6.)

That this is a correct statement of the nature of the aboriginal Indian title, and that lands so held by Indians are subject to grant before extinguishment of the Indian title, are established by a long line of clear and uniform judicial holdings:

Fletcher *vs.* Peck, 6 Cranch, 87.
Johnson *vs.* McIntosh, 8 Wheaton, 543.
Mitchell *vs.* United States, 9 Peters, 711.
United States *vs.* Fernandez, 10 Peters, 303.
Lattimer *vs.* Protect, 14 Peters, 4.
Clark *vs.* Smith, 13 Peters, 195.
United States *vs.* Cook, 19 Wall., 591.
Beecher *vs.* Wetherby, 95 U. S., 517.
Buttz *vs.* Nor. Pac. R. R. Co., 119 U. S., 55.
Veeder *vs.* Guppy, 3 Wisconsin, 502.
Opinion of Atty. Gen. Cushing, 8 Op. A. G., 255.

The decision of the Secretary in the present case states:

"The lands in question were at the date of the

passage of the Act of 1860 within what is commonly known as Indian country, not embraced in any defined Indian reservation, but the Indian title thereto had not been extinguished; in fact, no treaty had yet been made with the bands of Indians occupying these lands looking to the extinguishment of such title. That it was within the power of Congress to grant such lands, subject to the Indian occupancy, can not be questioned. See Buttz *vs.* Northern Pacific R. R. Co. (119 U. S., 55), and cases therein cited" (p. 23).

The lands in question were not sold, reserved or otherwise disposed of at the date of the swamp land grant. Express averment of the bill is that the entire region was "public land of the United States and subject to be granted by the United States, and that no part of the same had been or was reserved or dedicated to any public use, nor had any reservation of any part of the same been made or created, and no part of the lands had been sold, or bargained to be sold, or otherwise disposed of in pursuance of any law of the United States or otherwise, and the said lands were quite free of any claim," excepting the Indian right of occupancy (p. 5).

There is, therefore, no question as to the existence of any reservation or as to the effect of any kind of a reservation upon the operation of the grant. There had not been, on March 12, 1860, even such recognition of Indian boundaries or such assurance to the Indians of continued occupancy as might be implied by a treaty fixing certain limits of tribal residence, the first act of this nature being the Treaty of 1864, more than four years after the grant of swamp lands. If any lands subject at all to Indian occupancy and the aboriginal tenure could pass by any grant, then the

swamp land grant operated upon these lands. Indeed, unless that grant carried lands in the predicament of these, it would scarcely operate at all. In 1860, practically the whole of the territory within the limits of Oregon was still subject to the occupancy rights of the native inhabitants. There were a few trading settlements, like Portland and Astoria, the residents of which held their ground by unsettled and precarious titles, which rested for most of their strength upon mere occupation; and there were a few scattered agricultural holdings under some recent legislation. But the State as a whole was still occupied by Indian tribes, who were recognized as holding by a tenure precisely identical with that stated in this bill.

The ground upon which the Departmental decision in this case rejects the claim of the State is the fact that the lands in question were included in the reservation defined by the Treaty of 1864, and were therefore, by action subsequent to the date of the granting act, excepted from the grant.

It is, of course, not suggested that the lands had been reserved before March 12, 1860, and it is conceded that, at the date of the granting act, they were in condition to pass under the grant. The proposition of the Secretary is, that the Act of 1860 contained an excepting clause which made it possible for the United States, by future action, to withdraw from the operation of the grant, and to resume title to, lands which the Act itself had vested in the State.

The excepting clause of the Act of 1860 provides that the grant shall "not include any lands which the Government of the United States may have reserved, sold or disposed of (in pursuance of any law heretofore enacted), prior to the confirmation of title to be made under the authority of the said act."

The argument of the Department is thus stated in the Secretary's decision (pp. 23 *et seq.*):

"The question for consideration in this case is as to whether these lands were reserved, sold or disposed of (in pursuance of any law enacted prior to 1860), prior to the confirmation of title to be made under the swamp land grant, for, if they were, they are specifically excepted from the swamp land grant to the State.

"It becomes necessary to examine the legislation of Congress with regard to Indian rights within the former Territory, now the State, of Oregon, in order to determine this matter.

"The Act of August 14, 1848 (9 Stat., 322), established the territorial government of Oregon, and by section one provided:

" 'That nothing in this act contained shall be construed to impair the rights of person and property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to affect the authority of the United States to make any regulation respecting such Indians, their lands, property or other rights, by treaty, law or otherwise, which it would have been competent to the Government to make if this act had never passed.'

"This act gives plain recognition to the Indian's title or right of occupancy as theretofore exercised within the boundaries of the Territory thereby established, and clearly establishes a policy with respect to the extinguishment of such title or right of occupancy, in pursuance of which a treaty between the United States and the Klamath and Modoc tribes and Yahooskin bands of Snake Indians was concluded October 14, 1864, and proclaimed February 17, 1870 (16

Stat., 707). By this treaty the said tribes of Indians ceded to the United States all their right, title and claim to all the country theretofore claimed by them, . . . but it was provided that a certain described tract within the country ceded should be set apart as a residence for the Indians and held and regarded as an Indian reservation. * * * *

"In the matter of the lands included within the Klamath Indian reservation in the State of Oregon, the Indian title still remains unextinguished, and such title was in the same condition at the date of the passage of the swamp land act of 1860 as it was after the treaty of 1864. The treaty concluded in 1864 and proclaimed in 1870, but reduced the extent of the possession of these Indians, and was made in pursuance of the policy declared by the Act of August 14, 1848, *supra;* hence the reservation provided for therein was established in pursuance of a law prior to the swamp land grant of 1860. In this connection, see also State of Minnesota 22 L. D., 388, wherein it was held that lands within the Red Lake Indian reservation in the State of Minnesota, having a status very similar to the lands here in question, were held to have been excepted from the grant of swamp lands made to that State by the Act of March 12, 1860, *supra;* in the opinion of this Department, therefore, the grant by the Act of March 12, 1860, did not include any of the lands within the Klamath Indian reservation."

It will be submitted that every essential link in the Department's chain of reasoning is unsound.

The Act of 1848 does not "give plain recognition of the Indians' title and right of occupancy as thereto-

fore exercised," if by the words quoted is meant that Congress recognized such title as being of any greater validity, dignity and permanence than it had been, or than any other aboriginal tenure was and is. The Indian title is recognized as existing. But, so far from making any provision or assurance by way of strengthening it, the Act expressly reserves to the Government the power to make any regulation affecting Indian rights or property which would have been competent in case the Act had not been passed. The effect of this declaration is to leave the Indian title precisely where the Act found it, subject to the power of Congress, if indeed the declaration does not rather tend to make such rights more completely at the mercy of the Government. If this passage means anything material to the present question, it asserts on the part of Congress full liberty to deal with Indian lands and other property, and with the Indians themselves, in any manner which should seem proper. So far from guaranteeing to the Indians any security in their possessions, it is an affirmation of power to destroy their titles.

Of course, this reservation of a power in Congress "to make any regulation respecting such Indians, their lands, property and other rights," implies the power to make grants of their lands. So far as the provision goes, it tends to make it more clear that the swamp lands occupied by Indians were subject to the grant of 1860.

Moreover, the only effect of this declaration is to limit the construction of the Act of 1848, in which it occurs. The language is, "that nothing in this act contained" shall affect the authority of the United States in its dealings with the Indians. The proviso has no reference or application to any collateral or future legislation. If it could be treated as introduced for the benefit of the Indians, the only possible

benefit resulting therefrom would be limited to something else in the same statute. It certainly could not be invoked for the interpretation of matter occurring in an Act of twelve years' later date.

Again, the Act of 1848 does not, as is held by the Secretary, establish a policy with respect to the extinguishment of Indian titles. It would be difficult to discern the faintest outline of any policy in the words of the statute. There is no intimation as to whether the United States will or will not extinguish the Indian rights, or confirm them, or establish reservations, or remove the Indians to new places of abode. All that is said is that the Government shall continue to have the same powers, in the regulation of Indian affairs, which it had always, and independently this or of any other enactments, exercised. If this is what is meant by a policy, then it is admitted that the Act does declare a policy; but it is one which had existed and would be competent without the aid of statutory declarations.

Neither does the Act of 1848 assert the power, or confer upon anybody the authority, to reserve public lands for the use of Indians. There is nothing in the Act which has the remotest reference to such a subject or which would indicate that Congress had in mind the establishment of Indian reservations. Indeed it could scarcely have occurred to any one that Congress, or even the Executive, stood in need of a statute to enable reservations to be made, since Congress and the Executive had been doing that very thing without the aid of statute ever since the foundation of the Government. Equally unnecessary was it to formulate and declare any policy on the subject; and certainly the Act does not profess to do so.

Still less does the Act of 1848 provide or contemplate that any reservation, to be created in future, shall operate to defeat a grant of Congress previously

made. It will be impossible to find any words in the statute which even remotely suggest such a result. And it must be agreed that a provision of such unprecedented character would require the clearest of language to make it effective.

The Treaty of 1864 was not made, as is held by the Department, in pursuance of any thing in the Act of 1864. On its face it does not purport to have any relation to that statute, and there is nothing in its subject-matter to connect it with the statute. The power to make such an agreement was independent of this or any other enactment, such treaties having been made ever since the advent of white men upon this continent, before the Federal Constitution, before the Articles of Confederation, before the founding of some of the colonies. The treaty derives no support or authority from the Act of 1848, and has no relation to any possible policy which might be deduced from that Act.

Assuming, however, that the Treaty of 1864 was made in pursuance of the authority reserved and the policy declared in the Act of 1848, it is not clear how that fact is at all material to the status of these lands or bears in any way upon the construction of the intervening swamp land grant of 1860. The effect of the Treaty was simply to cede to the United States a large area of land which had previously been occupied by Indians, the latter reserving for their future occupation a fraction of their former possessions. The negotiation of such a treaty did not require the authority of any statute, and the policy reflected in the arrangement was nothing more than the policy of reducing Indian holdings which had been in vogue since the discovery of America. The agreement of the Indians to limit their residence to the reserved area did not at all alter the nature of their title or vary the manner of their tenure. The

lands remained, so far as the operation of any past or future grant was concerned, in precisely the same status as before. And such, indeed, seems to be the understanding of the Department on this subject. The decision of the Secretary expressly states that "such title was in the same condition at the date of swamp land grant of 1860 as it was after the Treaty of 1864. The Treaty concluded in 1864 but reduced the extent of the possession of these Indians" (p. 26).

If this is so, the Treaty was simply ineffective of any result that is material to the present inquiry. It must be agreed that the lands in question, in 1860, were in a condition to pass under the swamp land grant enacted in that year, and that they did so pass unless the subsequent Treaty so altered their condition as to undo the effect of the granting act. If, as the Secretary says, the Treaty of 1864 left them as they were and in the same condition as they had been in 1860, then the Treaty did not affect the grant or the title previously vested under the grant. This being so, the action taken in 1864 is immaterial and all mention of the Treaty is superfluous.

The Treaty of 1864 certainly did not reserve these lands, at least not in the sense of creating a new reservation, or in any other affirmative sense. The effect of the Treaty, as to these lands, was simply to continue the pre-existing Indian occupancy under the pre-existing aboriginal tenure. No change was made in the condition of the district defined for the future residence of the Indians, no new rights in the soil were created, and no assurance of greater dignity, stability or permanency was given to the former title. On the contrary, the extent of Indian occupation was reduced, and the original right of possession was rather weakened by the stipulation that the reserved district should be held at the pleasure of the President.

The only effect of the Treaty was a merely negative one, to leave matters precisely as they were before. If the lands thereafter occupied by the Indians were in a state of reservation, it was not by reason of anything in the Treaty, but because the Treaty had not altered their condition or the tenure by which they were held. It is, therefore, misuse of language to say that the Treaty created a reservation, or that the lands were reserved by the Treaty, such forms of expression implying a degree of affirmative action which had no place in any of the provisions of the Treaty.

Since the Treaty did not reserve the lands, it can not be said that they are reserved in pursuance of the Act of 1848, or of any supposed policy which might be held to warrant the reservation of lands in the interest of such a policy. The lands, if reserved at all, are reserved because of their condition anterior to the Treaty, anterior to the Act of 1860, anterior even to the Act of 1848, which condition, as we have seen, did not prevent the attachment of the swamp land grant. Inasmuch as neither the Treaty of 1864 nor the Act of 1848 made any alteration in the status of the lands, it is not perceived why either should be considered in connection with this subject.

It is, therefore, submitted that the whole reasoning of the Department is unsound, so far as it seeks to connect the reservation of these lands with the legislation of 1848. Even if it were granted that the Act of that year looked forward to the swamp land grant, so as to warrant an impairment of that grant as part of the Indian policy of the United States, and that the excepting clause of the Act of 1860 relates back to this remarkable provision of 1848, still there is nothing in the transactions affecting these lands which can be referred to any part of this legislation.

Not less unsound is the Departmental construction of the Act of 1860, in virtue of which the subtle

reasoning of the decision is made applicable to the present case.

The theory is, that the Act of 1860 authorizes the United States, by reservations to be created, sales to be made, and other modes of disposal to be practiced, after the date of the grant, to devest the State of the titles passed, and to resume the lands granted, under that Act. The excepting clause of the statute excludes from the operation of the grant all lands reserved, sold or otherwise disposed of by the United States, in pursuance of any law then existing, before the confirmation of title provided for by the Act. This confirmation of title is assumed to be the issue of patent. And the clause is construed to mean that the United States is at liberty, at any time before the swamp lands are actually patented, to reserve, sell or otherwise dispose of them, and thereby to withdraw them from the operation of the grant of prior date.

That this is a most extraordinary proposition, goes without saying. It implies, on the part of the United States, the power and the right, at its own pleasure, to revoke its grant and to resume all the titles conveyed in the State in 1860. Of course, this power, if applicable to any of the lands, is applicable to all, and the entire grant may be thus defeated if the Government should see reason to repent of its generosity to the State or should find some more advantageous use for the lands. All this is so contrary to first principles of law that one is at a loss to know what to say against such a doctrine.

It is obvious that, under this construction, the grant of 1860 ceases to be a grant at all, and becomes a mere method of disposing of swamp lands, of which the State may avail herself from time to time until in the discretion of Congress the Act is repealed or indirectly made unavailable. Indeed it is not

necessary that Congress should act at all, since reservations may be created by Executive order, and the grant thereby defeated. Upon the theory adopted by the Secretary in this case, every tract of swamp land in Oregon might, on the day after the granting act was passed, have been reserved for the use of Indians, or for any other public use; and even yet, all the unpatented swamp lands in the State may be so reserved, if it should seem good to the President, or perhaps to certain other executive officers. According to the same theory, once a body of swamp land is included in a reservation, it is free of the grant, and may then be disposed of at the pleasure of the Government or of the executive officers of the Government.

But this is not all. The excepting clause excludes from the grant, not only lands reserved in pursuance of some previously existing law, but also all lands "sold or disposed of" in pursuance of any such law. If the authority supposed to be given by the Act of 1848 to reserve swamp lands for Indian or other uses warrants the Government in permanently appropriating such lands, then it may sell or otherwise dispose of all such lands under the authority of any and every statute passed before 1860. In this way, the granted lands were, prior to the issue of patents, subject to cash sale, preëmption entry and other methods of disposal until the laws providing for such methods were repealed, and to the present day, if any act is still in force which antedates the year 1860 and authorizes any form of entry, then all unpatented swamp lands are subject to such form of entry, notwithstanding the grant of the State.

It needs neither argument nor authority to show that such a construction of the excepting clause in the Act of 1860 is utterly inconsistent with the nature of any kind of a grant, and inconsistent, especially, with

the nature of a grant *in presenti*, such as this grant has always been held to be. If the true sense of the excepting clause be what the Department holds it to be, then the exception is repugnant to the grant, and, upon well understood principle, must be treated as simply ineffective. If it means something else, then its meaning is not material to the present inquiry, and it is not necessary to suggest a different construction from that adopted by the Department. It may be observed, however, that the evident purpose of the excepting clause, whether well expressed or not, was to save rights vested, and perhaps right initiated, under preexisting laws and before the date of the grant. Taken in this sense, the clause of exception is reasonable in its nature, just in its effect, consistent with the purpose and character of the grant, and a prudent, albeit perhaps superfluous, precaution. Taken in the sense put upon it by the Departmental construction, the exceptions are antagonistic to the whole intent and result of the enactment, and amount to an annihilation of the grant.

Though authority upon the point would seem to be unnecessary, it happens that this very construction has been urged upon judicial consideration in at least two cases, one in this Court, and one in the Supreme Court of Oregon, and has been condemned by both courts.

In Gaston *vs.* Stott, 5 Oregon, 48, the State of Oregon had selected a tract of swamp land under the very statute now in question, and had sold the land to a citizen of the State. Before the issue of patent upon this selection, the Federal land officers had allowed a preëmption entry of the tract, which was, of course, a sale under the law of the United States enacted before the swamp land grant. Upon a bill brought by the State's vendee to quiet title, the preëmptioner contended that, under this excepting clause, it was

competent for the United States to dispose of the swamp lands in pursuance of the preëmption law at any time before the swamp land claim was passed to patent. This contention was overruled by the Supreme Court of Oregon in an exhaustive and well reasoned opinion, which has been cited and relied upon more than once by this Court.

In Wright *vs.* Roseberry, 121 U. S., 488, the Court cites Gaston *vs.* Stott, *supra*, and many other cases, both State and Federal, in an elaborate review of the subject intended to reaffirm and emphasize the present operation and indefeasible character of the swamp land grant. In fact, almost all the cases, in this and other courts, which deal at all with this grant, might be cited to the same effect, since nearly, or quite, all of them declare or assume that the grant vests an immediate title in the State, and this title cannot be defeated by subsequent grants, sales, reservations, or other forms of disposal by the Government.

The issue of patent has been held necessary for the conveyance of the legal title in the swamp land from the United States to the State; but it has never been held that patent is requisite to fix the right of the State to the land, and to fix it beyond impairment by subsequent action of the United States or other parties. That the purpose and necessary effect of the Department's project of allotting and patenting these lands in an impairment of the State's title, is fully obvious. It is a sale and final disposal of the ultimate fee to the Indian patentees, and a denial in perpetuity of the existing rights of the State.

It is, of course, not to be denied that the United States had the power, in 1864, to make an agreement with the Indians under which they should be entitled to remain in possession of the district reserved to

them, and of the swamp lands included within the district so defined. This arrangement only continued the existing Indian occupancy with which the granted lands were encumbered, and was in no way inconsistent with the nature of the grant. But that is essentially different from saying that the United States could, by treaty or other means, make a disposal of the land which would defeat the ultimate title of the State, and from holding that the consent of the Government to the continued occupation of the Indians operated a permanent appropriation of the lands in derogation of the swamp land grant.

It is also conceded that the State has no right to insist upon the removal of the Indians, now or at any other particular time, and that the United States may continue them in occupation of the lands so long as Federal policy requires such continued occupancy. The State, of course, took the lands subject to that burden, and has no reason to complain of any delay in obtaining possession under the grant. But the present scheme of the Department involves the disposing of the ultimate fee to the Indians, and contemplates the entire defeat of the grant as to these lands. This is palpably a very different thing from a mere postponement of the enjoyment of the grant, such as is incident to the Indian occupation, and it is something which entitles the State to protest as against an irreparable injury to her rights under the grant.

The decision of the Secretary in the present case is at variance with the previous rulings of the Department, which are, uniformly it is believed, to the effect that swamp lands in unceded Indian country pass to the States under the grant, and become available to the State upon the removal of the Indians:

Callanan *cs.* Railway Co., 10 L. D., 285.
State of Michigan 8 L. D., 308.

The case of State of Minnesota, 27 L. D., 418, is peculiarly in point, not only because it turned upon the construction of the very act of 1860 which extended the swamp land grant to Oregon and Minnesota, but by reason of a singular coincidence between the two cases in respect of the action taken, and even of dates at which such action was taken, concerning the lands.

This case involved the swamp lands of four townships in the White Earth Indian Reservation in Minnesota. The townships were originally part of the territory of the Chippewas. By an Act of 1854, the President was authorized to negotiate with the Chippewas for the purchase of a part of their lands and the erection of a reservation for their permanent residence. This was legislation antecedent to the swamp land grant looking to a permanent disposal of their lands, and legislation of the very kind which the decision in the present case seeks to find in the Act of 1848.

On March 12, 1860, by the statute here involved, the swamp land grant was extended to Minnesota and Oregon, nothing being as yet done under the Act of 1854. On that date, the Chippewa lands were subject to the aboriginal tenure, precisely as were the Klamath lands in Oregon. To make the parallel between the cases complete, the first step taken in the Chippewa case was a treaty made in 1864, the very year in which was made the Klamath treaty which the Department holds to have defeated the grant of 1860 to the State of Oregon. By this Chippewa treaty of 1864, which was followed by another in 1867, the White Earth Reservation was created out of the original tribal territory and was assigned to the Indians for their permanent residence.

In 1889, arrangements were made with the Chippewas by which the four townships were to be sold and the proceeds applied to the use of the Indians. It appearing that a portion of the lands were of swampy character, the question arose whether they were subject to the grant of 1860 or had been excluded therefrom by the effect of the legislation of 1854 and the treaties made in pursuance of that legislation. In submitting this question to the Department, the Commissioner of the General Land Office suggested that the Act of 1854 might be regarded as a law antedating the swamp land grant such as would bring the lands within the exceptive provisions of the grant, this being the identical theory upon which the Department proceeded in the present case.

The answer of the Secretary was prepared by Mr. Vandevanter, lately the Assistant Attorney General for the Interior Department. It was held that the treaties negotiated after the date of the swamp land grant were not in pursuance of the prior legislation, and that the swamp lands passed to the State under the Act of 1860.

The case of State of Minnesota, 22 L. D., 388, which is cited in the Departmental decision as similar to the present case in its facts and in the law applicable thereto, differed from this in one very material respect. In that case, the lands concerned were, at the date of the swamp land grant, in an actual reservation previously created. Such was the express finding of the Secretary, upon an elaborate examination of the facts. The lands there in question were a part of the Red Lake Reservation in Minnesota, and the school lands in the same reservation were the subject of the controversy in Minnesota *vs.* Hitchcock, 185 U. S., 373, cited above. In the latter case, this Court, after examining the history of the reservation,

came to the same conclusion as had the Department, finding that the reservation had been established and defined long before the date of the swamp land grant.

In Minnesota *vs.* Hitchcock, *supra*, it was held that the sixteenth and thirty-sixth sections in the Red Lake Reservation did not pass to the State under the school grant, there being for this conclusion two grounds: first, the lands were in a reservation at the date of the school grant; and, second, the lands were disposed of by treaty with the Indians before survey, at which point it first became possible for the school grant to attach to them.

The Departmental decision in State of Minnesota, 22 L. D., 388, and the decision of this Court in Minnesota *vs.* Hitchcock are, by implication at least, in favor of the contention now made by the State of Oregon. Upon the same *ratio decidendi*, the swamp lands of the Klamath Reservation should be held to pass to the State, because they were not in reservation at the date of the swamp land grant, and because there was not any attempt to dispose of them, by treaty or otherwise, before the date at which the grant attached to them if it ever attached.

It is accordingly submitted that the Departmental construction of the Act of 1860 is unsound in respect of the effect to be given to the excepting clause, and that the Secretary's decision, holding it competent to the Government by the Treaty of 1864 to defeat the title vested in the State by the Act of 1860, must be pronounced erroneous. It follows that the proposed allotment and patenting of the swamp lands in the Klamath Reservation is in prejudice of the rights of the State.

IV.

INJUNCTION AN AVAILABLE REMEDY.

Assuming the soundness of the foregoing argu-

ment, the bill states a case in which the Secretary of the Interior, without warrant of law and against law, under color of official authority, has invaded the rights of the State and threatens to inflict irreparable injury upon the property of the State.

The eighth and ninth grounds of demurrer suggest that, even if this is true, the State is without remedy and the judiciary is powerless to prevent the wrong initiated and threatened to be consummated by the executive officers of the Government. This suggestion is based on the proposition that, so long as the legal title to the lands remains in the United States, the Land Department may dispose of it in any manner that may seem proper to the head of the Department, and that the courts can not restrain any disposal of the lands, however unlawful in itself or however injurious to the vested rights of the party entitled to the property. It will be submitted that the rule on the subject has never been carried to this length, and that the usual rule does not apply to a case circumstanced as is the present.

Upon the averments of the bill, and upon the law applicable to the facts stated, the State of Oregon has in the lands a vested title such as is recognized and protected by the courts. Though the legal title remains in the United States, it so remains only for the purpose of being transferred to the State; and though the legal title is under the control of the Secretary of the Interior, the equitable title in the State is one which that officer is bound to respect, and which he can not arbitrarily destroy or impair. Of the ordinary entry by an individual under a general law, it is said:

> "By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than

> he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it."
>
> Cornelius *vs.* Kessel, 128 U. S., 456, 461.
> Brown *vs.* Hitchcock, 173 U. S., 473, 478.

The duty of the courts, in a proper case, to respect such an equitable title is equally clear. According to the averments of the bill and the admission of the demurrer, the lands described were granted to the State in 1860, by a grant which passed an immediate title, wanting only the issue of patent to make it perfect and complete legal title. The State has done all in her power to perfect this title, and her endeavor to that end is frustrated only by the refusal of the Department to perform its duty in the premises. The case is therefore within the rule laid down in Lytle *vs.* Arkansas, 9 How., 333, "that, where an individual, in the prosecution of a right, does everything which the law requires him to do, and he fails to attain his right by the misconduct of neglect of a public officer, the law will protect him."

The State being entitled to have the lands patented, she is, so far as her right to be protected is concerned, in as favorable a situation as if patents had been, as they should be, issued.

In Simmons *vs.* Wagner, 101 U. S., 260, the plaintiff in ejectment produced a patent of the United States for the demanded premises. The defendant relied upon an uncanceled certificate of purchase, upon which, however, it was conceded that no patent had been obtained; and it was held that, upon such equitable right to demand a patent, the defendant should prevail against the patent actually issued, the Court declaring:

> "Where the right to a patent has once become vested in a purchaser of public lands, it is equivalent, so far as the Government is concerned to a patent actually issued. The execution and delivery of the patent, after the right to it has become complete, are the mere ministerial acts of the officers charged with that duty."

So in Stark *vs.* Starr, 6 Wall., 402, 417, the Court said:

> "Before the passage of this Act, the claim of the defendant Stark had been surveyed, and the required proof of his settlements and continued occupation and residence made, and such steps had been taken as to perfect his right to a patent. The lands embraced by his claim had then ceased to be the subject of purchase from the United States by any person, natural or artificial.
>
> *"The right to a patent once vested is treated by the Government, when dealing with the public lands as equivalent to a patent issued."*

So, universally, the right conferred by a complete entry, wanting only patent to consummate legal title, is property; the land is not subject to other entry, and it is taxable as private property:

> Carroll *vs.* Safford, 3 How., 441.
> Witherspoon *vs.* Duncan, 4 Wall., 210.
> Rwy Co. *vs.* Prescott, 6 Wall., 603.
> Railroad Co. *vs.* Price Co., 133 U. S., 496.
> Cornelius *vs.* Kessel, 128 U. S., 456.

It is, of course, not intended to be argued that the rights of one who stands upon an unpatented entry are identical always with the rights perfected by patent; and it is conceded that, in respect of pro-

cedure and as matter of forensic practice, decided distinctions exist. Not in all cases can a merely equitable right to demand a patent be enforced and protected with the same effect as the legal title under a patent actually issued.

The titles to swamp lands vested by the grant in the States, however, if not actually constituting a class by themselves, are at least the subject of exceptional treatment and recognition by the courts, including this Court, in respect of protection and enforcement in advance of patenting. Whereas generally in other cases, the patent is essential to give the claimant any standing in a court of law, it is settled that, under certain circumstances, the title conveyed by the swamp land grant is available without patent in ejectment and in other actions in which legal title is usually requisite. As was remarked in French *vs.* Fyan, 93 U. S., 169:

> "This court has decided more than once that the swamp land act was a grant *in praesenti*, by which the *title* to those lands passed at once to the State in which they lay."

Accordingly, in Railroad Co. *vs.* Smith, 9 Wall., 95, upon ejectment brought against one in possession and claiming the land as swamp land granted to the State, it appearing that the Department had failed and neglected to adjudicate the character of the land, it was held that the defendant was at liberty to show to the jury by parol proof that the tract was in fact swamp land and so a part of the grant to the State. In its reasoning to this result, and as dispensing with the necessity of patent for judicial protection of the grantee's rights, the Court said:

> "Here is a present grant by Congress of

certain lands to the States within which they lie, but it is by a description which requires something more than a mere reference to their townships, ranges and sections, to identify them as coming within it. In this respect, it is precisely like the railroad grants, which only become certain by the location of the road. In fact, in this regard, the swamp land grant was the more specific, for all the lands of that description were granted, and they have remained so granted ever since, while no particular land was described by the railroad grant, which was a float, to be determined by the choice of the line of the road in future. * * *

"By the second section of the Act of 1850, it was made the duty of the Secretary of the Interior to ascertain this fact [the swampy character of the land], and to furnish the State with evidence of it. Must the State lose the land, though clearly swamp land, because that officer has neglected to do this? The right of the State did not depend upon his action, but on the Act of Congress, and though the States might be embarrassed in the assertion of this right, by the delay or failure of the Secretary to ascertain and make out lists of the lands, the right of the States to them could not by defeated by that delay. * * * *

"The matter to be shown is one of observation and examination, and, whether arising before the Secretary, or *before the court, whose duty it became because the Secretary had failed to do it*, this was clearly the best evidence to be had, and was sufficient for the purpose.

"Any other rule results in this, that, because the Secretary of the Interior has failed to discharge his duty in certifying these lands to the

> States, they, therefore, pass under a grant from which they are excepted beyond doubt; and this, when it can be proved, by testimony capable of producing the fullest conviction, that they were of the class excluded from the plaintiff's grant."

In a subsequent case, the Court said in further explanation of its decision in Railroad Co. *vs.* Smith:

> "The admission [of parol proof] was placed expressly on the ground that the Secretary of the Interior had neglected or refused to do his duty; that he had made no selection or lists whatever, and would issue no patents, although many years had elapsed since the passage of the act. * * * There was no means, as this court has decided, to compel him to act; and, if the party claiming under the State in that case could not be permitted to prove that the land which the State had conveyed to him as swamp land was in fact such, total failure of justice would occur, and the entire grant to the State might be defeated by this neglect or refusal of the Secretary to perform his duty."
>
> French *vs.* Fyan, 93 U. S., 169, 173.

In at least one other case, it has been affirmed that the title passed to the State by the swamp land grant is sufficient, in advance of the issue of the patent, to maintain ejectment.

Wright *vs.* Roseberry, 121 U. S., 488, was an action of ejectment brought in one of the courts of California, and which reached this Court upon writ of error to the Supreme Court of that State. The plaintiff alleged and sought to prove that the lands were in fact of swamp and overflowed character, and

so granted to the State of California by the swamp land Act of 1850, and he asserted title under a conveyance to him from the State. The defendant had been allowed to enter the land under the preëmption laws of the United States and had received patents from the General Land Office, upon which they relied as conclusive of the title and right to possession. The State courts agreed with the defendants on this point, and excluded the proof proffered by the plaintiff as to the actual character of the land. In reversing the judgment below, on the ground of error in this ruling, this Court said:

> "It does not distinctly appear what caused the District Court to change its first decision with respect to these lands, which it had originally held to be swamp and overflowed; but as it admitted in evidence the patents of the United States, and held that they passed the title to the defendants, it probably had reached the conclusion which the Supreme Court subsequently announced, that the plaintiff could not maintain an action upon the title to swamp and overflowed lands until they had been certified as such to the State, pursuant to the fourth section of the Act of Congress of July 23, 1866, 'to quiet land titles in California.' For want of such certificate, the court decided that the title to the demanded premises never vested in the State, and that she could not convey a title to the plaintiff upon which he could maintain an action of ejectment against persons in possession under patents of the United States. This ruling constitutes the alleged error for which a reversal is sought. * * * *
>
> "The court below held, and placed its decision upon the ground that, because the Com-

missioner of the General Land Office had not certified the lands to the State as swamp and overflowed, when this action was commenced in 1870, there was no title in the State which could be enforced, thus making the investiture of title depend upon the Act of the Commissioner instead of the Act of Congress; whereas the certificate of that officer, when the previous requirements of the law have been complied with, is only an official recognition that the lands are of the character designated, and of the completeness of their segregation. This decision is in conflict with its previous decisions and with the adjudged cases to which our attention has been called. * * *

"For the error in holding that the certificate of the Commissioner was necessary to pass the title of the demanded premises to the State, the case must go back for a new trial, when the parties will be at liberty to show whether or not the lands were in fact swamp and overflowed on the day that the swamp land act of 1850 took effect.

"If they are proved to have been such lands at that date, they were not afterwards subject to pre-emption by settlers. They were not afterwards public lands at the disposal of the United States." (p. 521).

It should be mentioned that the certificate of the Commissioner, of which mention is made in this opinion, was, by a special statute applicable to the swamp lands granted to California, substituted for the patent prescribed by the general act as the final step in the completion of title under the grant.

Although, in the face of the decision in Brown *vs.* Hitchcock, 173, U. S., 373, these cases can not be said

to establish the unpatented title under the swamp land grant as a legal title, yet they show that such title has, in many cases, much the same effect as a legal title, and is peculiar among merely equitable titles in respect of judicial recognition and of availability for the protection of rights under the grant. If anything, short of a patent actually issued, will give its owner standing in any court, the title to swamp lands shown in this case is one upon which the State may pray protection against unwarranted action by the Land Department.

The same cases suffice to dispose of the objection, suggested by the demurrer, that the present defendants have not adjudicated the swampy character of the lands mentioned in the bill. The admission of the demurrer establishes the averment of the bill that the lands are swamp and overflowed and of the character designated in the granting act. The cases cited show that the omission of the Department to ascertain and certify the character of the lands will not be allowed to prejudice the rights of the grantee if that character can be established by other means and in other modes. In this instance, the defendants have refused to consider or determine the actual character of the land, on the ground that that fact is immaterial. It is, therefore, a stronger case than that of Railroad Co. *vs.* Smith, in which the absence of patent was due to mere neglect, oversight or inability of the Secretary to adjudicate the question. Indeed, it is almost the case of Wright *vs.* Roseberry, *supra* in which it was expressly declared that the State, to prevent failure of the grant, might prove the character of the land in any case in which the Secretary had failed or refused to pass upon the fact. The language is:

"The result of these decisions is, that the grant of 1850 is one *in praesenti* passing the title to the lands as of its date, but requiring identification of the lands to make it perfect; that the action of the Secretary in identifying them is conclusive against collateral attack, as the judgment of a special tribunal to which the determination of the matter is intrusted; but, when that officer has neglected or failed to make the identification, it is competent for the grantees of the State, to prevent their rights from being defeated, to identify the lands in any other appropriate mode which will effect that object.

"*A resort to such mode of identification would also seem to be permissible, where the Secretary declares his inability to certify the lands to the State for any cause other than a consideration of their character*" (121 U. S., 508).

In this case, the very grievance complained of is that the defendants refuse to determine the character of the lands; and the very relief prayed is that they may be restrained from disposal of the lands until they have performed that duty. The State has produced the requisite evidence to enable the defendants to act; and this evidence is sufficiently persuasive to secure the favorable finding of the Surveyor General, the proper officer to consider the question in the first instance. This would be, at least *prima facie* proof of swampy character, independently of the admission by demurrer. For the purposes of the present argument, at any rate, it must be assumed that the lands are in fact of a character to pass under the grant, and that fact is established by a method which is legitimate under the circumstances.

Assuming, then, as must be conceded, that the State has the equitable title to these lands, the question is whether that title is of such character that it may be protected by judicial proceedings to restrain the Department from destroying it by an unlawful transfer of the legal title to other parties.

The position of the demurrer is, that the officers of the Land Department, because they are the officers of the Land Department, are immune from question or control by this Court, no matter how unlawful or injurious may be their proposed disposition of the lands.

If Mr. Hitchcock, as a gentleman in private station, held those lands upon the same trust upon which, as the Secretary of the Interior, he holds control of them, there would be no question as to his amenability to this proceeding. Granting that the property is in the State and that she has the right to demand a patent for them, then the legal title is in the Government only upon trust to convey it to the State. In a private transaction, a trustee, holding upon such a trust, who should unadvisedly and erroneously propose to transfer the legal title to a stranger, would unquestionably be subject to restraint by injunction and guidance by a decree directing the proper conveyance to be made.

That the officers of the Land Department are not, in all cases, or even in most cases, in their dealings with public lands, subject to the same processes as private trustees, is of course conceded. For the errors of such officers another remedy is, in general provided, a bill in equity after patent issued. In this case, however, that remedy is, not only certainly inadequate, but in all probability utterly unavailing and illusory.

The inadequacy of a bill in equity, to be brought after the issue of patents to the Indians, as a means

of vindicating the title of the State to these lands, is clear and palpable upon consideration of the facts stated in the bill. The patents are proposed to be issued under the Indian Allotment Act of 1887, as amended by the Act of 1891. The lands already appropriated for allotment, about 55,000 acres, will be partitioned in tracts of 80 acres to nearly 700 Indians. The total acreage of the swamp lands, as to which the same right and power of appropriation are asserted, will make allotments for between 1100 and 1200 persons. The lands appear to be worth about one dollar an acre (p. 30). More than this, the patents immediately in contemplation will not convey a legal title, but merely declare that the United States holds the land in trust to convey fee simple to the several patentees at the end of twenty-five years (p. 11). In other words, the only present effect of the proposed patents, will be to convert the existing implied trust upon which the lands are held for the State of Oregon into an express trust for the Indians upon which they are to be held for twenty-five years. If the theory of the demurrer upon this point is sound, the State can no more try her title in any court after the issue of the patents than she can now, there being for the life time of the trust estate the same objection to the jurisdiction of the courts, and of all courts, which is now urged against the jurisdiction of this Court.

Unless, therefore, the present bill will lie to vindicate the title of the State, she is postponed for twenty-five years. The mere delay is an injury, since the adoption by the Department of the policy of allotment is evidence that the lands are no longer needed for reservation purposes or for tribal occupancy of the character to which they were subject when granted. The grant was, of course, burdened with the Indian right of possession, but that was a

right to occupy and inhabit only under the aboriginal tenure and in accordance with the manner and custom of aboriginal inhabitancy. The proposed settlement of the Indians in severalty is a manner of occupation not in the contemplation of the parties to the grant, and it will impose upon the grant a different and a greater burden in addition to delaying the State's enjoyment of the lands. Practically, the injury to the State is even more serious. The patents, both the trust patents and the ultimate fee simple patents, will cast upon the State's title a cloud which, at best, it will be a difficult and costly matter, and one of doubtful success to remove. It will be necessary to bring from 700 to 1200 separate suits, against as many individual defendants, each for a tract of 80 acres, which is worth now less than $100, and which is not likely to increase greatly in value under Indian occupation. By the date at which, upon the theory of the demurrer, these suits may be brought, it is to be presumed that the allottees will have been in possession for a very long period, as compared with the usual span of human life, and will be domiciled upon the lands in a manner which will render it a difficult and unpleasant undertaking to dispossess them. The considerations of sentiment and humanity involved in such a recovery of 80,000 acres, occupied by citizens of the United States for more than a quarter of a century, would be such as probably to preclude an attempt on the part of the State to assert her title, and would certainly render the litigation distressing to all concerned if not utterly futile.

To prevent the clouding of the State's title, to avoid such multiplicity of suits, and to supplement the palpable inadequacy of the only possible other remedy, the present resort to equity in the

first instance would, in any ordinary case, be unquestionably justified.

Were the present defendants, instead of being officers of the United States, officers of some one of the States, vested with corresponding powers and charged with corresponding duties in respect of the public lands of the State, such a bill as this, on such averments of fact, would be sustained against them. The cases already cited under the first head of this argument are believed to be sufficient to establish this proposition. Special attention is invited to one of these cases, Davis *vs.* Gray, 16 Wall., 203, because that case can be distinguished from the present only on the fact that there the defendants were the officers of the State of Texas, bearing the same relation to the State and to the public lands of the State which the present defendants bear to the United States and to the public lands of the United States. The case stated by the bill, as already set out, was one in which the land officers of the State were proceeding, in disregard of the rights of the complainant corporation, to sell the lands claimed under a grant to the corporation to a multitude of individuals. In affirming the decree of the Circuit Court by which a demurrer to the bill, proceeding upon the ground now urged to the present bill, was overruled, this Court said:

> "A case more imperatively demanding the exercise of jurisdiction in equity could hardly be imagined than that presented in this bill. Should the interposition invoked be refused, doubtless the reservation would speedily be thatched over with adverse claims. A cloud would not only be thrown upon the title of the company, but the time, litigation, labor and expense involved in the vindication of its rights,

would very greatly lessen the value of the grant and materially delay the progress of the work it was intended to aid. The injury would be irreparable. It is the peculiar function of a court of equity in a case like this to avert such results." (p. 232).

Not merely inadequate, however, but utterly nugatory is the only alternative remedy of the State likely to prove. At the end of twenty-five years, when she is able to bring her thousand suits in ejectment, she will be confronted with patents in the hands of the defendants, which purport to carry the legal title from the United States, and under which possession has been held for the lifetime of a generation. The only principle upon which such muniments of title can be assailed is that established and applied in the above cited case of Railroad Co. *vs.* Smith, namely, that the actual character of the land may be shown by parol. That case, however, as well as the case of Wright *vs.* Roseberry, *supra*, to similar effect, has since been subjected to a qualification, which there is reason to apprehend may prove applicable in these proposed ejectment cases to be brought by the State of Oregon. The qualification suggested may be thus stated: Where the character of the land has been, expressly or by fair implication, passed upon by the Interior Department, and no patent for it has been issued, under the swamp land grant, it is conclusively presumed that it is not within the grant, and it is incompetent to show by any kind of proof that it is swamp in character. In other words, the liberty to prove by parol that a tract is within the grant, is limited to cases where there has been no actual or virtual adjudication by the Department. This, of course, is the converse of the rule, settled in

French *vs.* Fyan, *supra*, that the issue of a patent for a tract as swamp land is conclusive as to the fact of its character. The effect of the later ruling is that, the mere passing over by the Secretary of a tract of land, when neighboring tracts are listed as swamp land, precludes subsequent proof that the tract was in fact of swampy character. And, *a fortiori*, of course, the issue of patent under another law likewise shuts out the contention that the tract was granted to the State.

In Chandler *vs.* Calumet and Hecla Mg. Co., 149 U. S., 79, the plaintiff, claiming the land as swamp under conveyance from the State, offered, upon authority of Railroad Co. *vs.* Smith, *supra*, to show by parol that the land was actually of that character. It appeared, however, that the State officers, who had presented to the Interior Department the claims of the State under the swamp land act, had omitted the land in question from their lists, though claiming other land in the same township, and that the list approved by the Secretary as of swamp lands did not include this tract. Subsequently the tract was patented under another Act of Congress. Upon these facts, this Court held that the case was not within the decision in the Smith case, and that the character of the land could not be shown by parol, because the issue of the patent, under the circumstances, amounted to an adjudication that the tract was not swamp land.

On this point it was said:

> "In support of the first proposition, the plaintiff in error relies upon the case of Railroad Company *vs.* Smith, 9 Wall., 95, in which oral evidence was admitted to establish the fact that the parcel of land there in dispute was swamp and overflowed land at the date of the

swamp land act. But in that case, there was no selection or identification of the land, under either the swamp land act or under the subsequent grant for railroad purposes. The selection and identification under each of said acts was left open and undetermined when the respective titles involved therein were acquired. * * * *

"The facts of the present case present the direct converse of the situation which existed in the case of Railroad Company *vs.* Smith. But aside from this, the rule as to oral evidence, recognized in that case, was afterwards explained, and limited in its operation to cases in which there had been non-action or refusal to act on the part of the Secretary in selecting land granted, as appears in the subsequent cases of French *vs.* Fyan, 93 U. S., 169, 173, and Ehrhardt *vs.* Hogaboom, 115 U. S., 67. 69, where parol evidence was offered to show that patented lands were not of the character described."

In the face of this decision, it will be difficult, once the Department has patented the lands to the Indians, to maintain that the State may show their actual character as against the patents. It results that the proposed patenting of the lands amounts to an adjudication that they are not within the swamp land grant, and will be conclusive against any future claim of the State. The action contemplated is, not merely a postponement and impairment of the State's right, but an utter destruction of her title.

This being so, the only possible alternative remedy, if this bill is not competent to the State, is merely illusory. The case is one, not of simple inadequacy of remedy, but of absolute deficiency of

other means of protection against defeat of the grant.

This fact suffices to distinguish the present action from those in which the rule has been laid down, that the officers of the Land Department are not subject to the control of the courts in their administration of the public lands. All the decisions which affirm in favor of those officers an immunity from suit contemplate as possible an ulterior proceeding in equity, after the issue of patent, in which the errors of the Department may be corrected. That this rule is proper and based upon sound consideration of policy is not denied. But, it is submitted, the fact that the Departmental action now proposed will, whether certainly or probably, preclude the State from the usual remedy in such cases, suffices to make the present situation an exception to the usual rule.

Upon the further ground, that the proposed action of the Department is a plain violation of the legal rights of the State, and not at all discretionary in its nature, the present case may be declared an exception to the general rule which accords to the land officers immunity from judicial control. Upon the admitted facts, and under the legal principles assumed to be established, the contemplated issue of patents to the Indians is unlawful and injurious to the State. To hold that, upon a matter which is so clear in point of fact as well as in point of law, the Secretary of the Interior is at liberty to violate the law if he chooses, or is badly advised, is equivalent to saying that in no possible case can his illegal action be controlled or prevented.

The cases which establish that immunity from suit which is pleaded by the demurrer all proceed upon one or both of two grounds; either that the matter is one involving issues of fact which are by law com-

mitted to the decision of the Department, and which require such means and character of proof as are not available in actions for mandamus or injunction; or, that the matter is one which requires such a degree of administrative discretion as is most properly exercised, in the first instance at least, by executive officers, and cannot properly be controlled by judicial action. An examination of a few of the leading cases, in which it has been held that the administration of the public lands will not be regulated by the courts, will disclose to what extent those cases differ from the present.

In Decatur *vs.* Paulding, 14 Peters, 497, the duty sought to be enforced against the respondent Secretary of the Navy involved, not only the construction of several statutes, and divers other considerations of law and official propriety, but also the apportionment of the fund out of which the claims of the relatrix must be satisfied if satisfied at all. The court, after suggesting some of the legal questions involved, adds:

> "And after all this was done, he must have inquired into the condition of the navy pension fund, and the claims upon it, in order to ascertain whether there was money enough to pay all the demands upon it; and, if not money enough, how it was to be apportioned among the parties entitled."

United States *vs.* Black, 128 U. S., 40, was, like Decatur *vs.* Paulding, a case involving the allowance of pensions. A pension, as has been more than once declared in this Court, is a mere gratuity on the part of the Government, which the Government may grant or withhold at discretion, and the grant of which may be limited by any conditions

which Congress may see fit to impose. If the law is so that, as one of such conditions, the allowance of a pension is left to the uncontrolled discretion of an executive officer, that fact affords no support for the proposition that another executive officer has uncontrolled discretion, in the exercise of his official functions, to take property which, upon conceded facts and the true construction of law, belongs to A, and to give it to B, as a matter of mere official discretion or official authority to interpret the law.

In United States *vs.* Commissioner, 5 Wall, 563, there had been a controversy in the General Land Office between conflicting claims and involving disputed matters of fact, and the land had been patented to the claimant who had opposed the relator. It was manifestly beyond the power of the Commissioner to issue another patent, and the Court observed that the case was one which called for evidence "not consistent with the proceedings in the case of mandamus." Upon the power of the courts in any case to enforce the right to a patent, it was said:

> "Whether or not a mandamus will lie in any case to compel the issuing of a patent is a question not necessarily involved in this case; we have not therefore examined it, and express no opinion upon it."

In the case of the Secretary *vs.* McGarrahan, 9 Wall., 298, on an application for mandamus to require the issue of a patent for lands claimed by the relator, the merits of the relator's claim were examined in considerable detail and the conclusion reached that his own statement did not show that he was entitled to the patent. After noticing some

other difficulties of a technical nature, the Court held that a proper case for mandamus had not been made out. Adverting to the distinction between matters discretionary and matters ministerial in nature, and stating that in respect of the latter class the writ applies, the opinion laid down this test of the difference:

> "The principle is strictly limited to the enforcement of mere ministerial acts not involving the necessity of taking proofs and it has never been extended to cases where controverted matters were to be judicially heard and decided by the officer to whom the writ is required to be addressed."

Littlefield *vs.* Register *et al.*, 9 Wall., 575, was a bill to enjoin the register and receiver of a local land office from acting upon applications and proofs in pre-emption claims asserted by a large number of persons seeking to make entries of lands to which the complainant asserted a better right. Obviously enough, there was no occasion for the interference of the courts at that stage of the proceedings, since whatever action might be taken by the local officers was subject to review by the Commissioner of the General Land Office and by the Secretary of the Interior. More than this, the Court was moved by the nature of the case as thus stated in the opinion:

> "The bill shows on its face that these officers, in the exercise of this duty, were considering whether the reservation of the departments and the acts of Congress, and the claims of the plaintiff under them, took these lands out of the category of lands subject to sale and pre-emp-

> tion, and he asks the court to interfere by injunction to prevent them from determining that question, and that the court shall determine it for them. He says the court below erred because it did not require them to come in and answer to his claim of title, and at their own expense to put the court in possession of their views, and convert the contest before the land department into one before the court. This is precisely what this court has decided that no court shall do. After the land officers shall have disposed of the question, if any legal right of the plaintiff has been invaded, he may seek redress in the courts. He insists that he now has the legal title. If the land department finally decides in his favor, he is not injured. If they give patents to the applicants for preemption, the courts can then, in appropriate proceedings, determine who has the better title or right."

It requires no argument to show that the case so stated is essentially different from the present in which the last authority of the Department has acted, there is an end of consideration, an erroneous conclusion to the manifest prejudice of the complainant, and that conclusion of such a character as to preclude redress by any action of any court.

Moreover, in the Litchfield case, as in nearly, if not quite, all of the other cases, there were adverse claimants asserting rights or titles antagonistic to that of the applicant for relief; and this fact was noticed as a further objection to the consideration of the merits on a bill against the land officers alone. In the present instance, on the other hand, it is not pretended that the Indians, or other persons, have any rights or interests in the lands which could be

urged against the claims of the State, the whole objection to the right of the State being the Secretary's desire to take the lands for other purposes.

In some other cases, in which mandamus or injunction has been refused, there was conflicting evidence upon issues of fact, and upon those issues the Department had decided against the petitioners:

Gaines *vs.* Thompson, 7 Wall., 347.
Marquez *vs.* Frisbie, 101 U. S., 473.
United States *vs.* Lamar, 116 U. S., 423.

Michigan Land and Lumber Co. *vs.* Rust, 168 U. S., 589, was a case in which the legislature of the grantee State had admitted and represented to the Secretary of the Interior that certain lands listed, but not patented, to the State under the swamp land grant, were not in fact swamp in character, and the Secretary had cancelled the listing. The case was ejectment between private parties, and the question presented was merely as to the power of the Secretary to revoke his approval of the lists, and not at all as to the liability of the Department to restraint.

Brown *vs.* Hitchcock, 173 U. S., 473, turned simply upon the same question decided in the Michigan case and was controlled by that decision. The Secretary of the Interior had revoked his predecessor's approval of a list of swamp land selections under circumstances which as stated in the bill suggested fraud in the procurement of the original approval. The very action complained of was a decided affirmation on the part of the Secretary that the lands were not swamp in character and were not granted to the State. This was a finding of fact, presumably upon proper evidence and due hearing, had by the tribunal to whom the law entrusted the determination of the character of the lands. The ruling was

that, so long as the legal title remained in the United States, the jurisdiction of the Department to determine such facts continued, and that the defendant Secretary had power to review and vacate the finding of his predecessor.

Manifestly, these decisions afford no support to the proposition that, where the Department admits the facts which constitute a valid title in the petitioner for relief, and admits that it proposes to violate, and even utterly to destroy, his rights, the usual immunity from suit may be set up to defeat the relief demanded.

This fact distinguishes the present case from all those cited, and it is believed from all that can be cited, in respect to public lands, that here the facts which make the complainant's title are admitted, and the only issue is a naked question of law arising upon undisputed facts. Not only do distinct averments of the bill state a title in the State, but the only finding of fact which it has been possible to obtain approves the State's claim. There has been no finding anywhere adverse to the swampy character of the land, and there is no suggestion on the part of the defendants that the allegation of swampy character is erroneous. The position taken by the demurrer amounts simply to this, that the Department may concede all the facts which constitute a clear legal right in the petitioner, and still deny him the protection of the courts against Departmental action destructive of that right which is manifestly illegal or even sheerly arbitrary.

The conceded authority of the Department to interpret, in the first instance, the laws prescribed for its guidance does not reach to any such extent. The mere fact that a defendant in mandamus is obliged to construe a statute, and to apply it to the subject matter of the controversy, and that he re-

lies upon his construction of the law as a defense, does not oust the jurisdiction of the courts to overrule the defendant's understanding of the law and to enforce his clear legal duty under the law as correctly interpreted. If that were so, it would be an end of the remedy by mandamus, since there are few cases of that character which do not involve disputed points of law.

In Roberts *vs.* United States, 176 U. S., 221, the petition for mandamus stated, as was adjudged in the case, a clear right in the relator to certain moneys to be paid by the Treasurer of the United States, who was the respondent. The latter set up, as a defense to the action, a statute which, as he construed it, made the demanded payment unlawful. The proposition relied upon by the respondent was, that, even if, upon a correct interpretation of the statute, it did not have the effect which he supposed, still his duty to construe the statute for himself and for his own official guidance, made his action in the matter not ministerial but discretionary, and so not subject to control by mandamus. Upon this point, the Court said:

> "Unless the writ of mandamus is to become practically valueless, and it is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute, to some extent, requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other

than a purely ministerial one. If the law directs him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of the writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and, when his refusal is brought before the court, he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

Upon these principles, it might be, if that were necessary, contended even that mandamus will lie, in a proper case, to enforce the duty of executing and delivering a patent. If the officer charged with that duty finds the facts which entitle the applicant to a patent, and, in response to the rule in an action of mandamus, returns an admission of those facts, it would be going a great way to say that he could justify his refusal of the patent upon a construction of the law which is plainly erroneous and

must be so pronounced by the court. In respect of patents for inventions, we have the authority of this Court for saying that the duty of the Commissioner of Patents in such a case is enforcible by mandamus, the facts being undisputed and the only question being one of law.

Butterworth *vs.* Hoe, 112 U. S., 50, was an application for mandamus to compel the Commissioner of Patents to execute and deliver a patent for an invention to which he had found that the relators were entitled. The defense was that the Secretary of the Interior, in the exercise of an assumed appellate authority over the Commissioner's action, had overruled the Commissioner's decision in the matter and had forbidden issue of the patent after considering the law applicable to the power of the Secretary and holding that he had no appellate jurisdiction over the Commissioner, the Court held that it was a proper case for mandamus. It was said:

> "Some question is made as to the remedy. We think, however, that mandamus will lie, and that it was properly directed to the Commissioner of Patents. He had fully exercised his judgment and discretion when he decided that the relators were entitled to a patent. The duty to prepare it, to lay it before the Secretary for his signature, and to countersign it, were all that remained, and they were all purely ministerial. These duties he had failed to perform, merely out of deference to the claim of the Secretary to reverse and set aside the decision on the merits in favor of the relators. This we have held not to be a valid excuse. The case falls clearly within the principles acted upon in

> Commissioner of Patents *ex.* Whiteley, 4 Wall., 522."

Upon no valid ground can the application of the same principle be denied in a case involving the issue of title from the United States to one showing himself entitled to a patent for a parcel of public land. Indeed, this Court has declared that the issue of such a patent is a mere ministerial duty.

> "When the right to a patent once became vested in a settler under the law, it was equivalent, so far as the Government was concerned, to a patent actually issued. * * *
>
> "The execution and delivery of the patent after the right to it is complete are the mere ministerial acts of the officer charged with that duty."
>
> Barney *ex.* Dolph, 97 U. S., 652, 656.
> Simmons *ex.* Wagner, *supra.*

The power of a court to enforce the execution and delivery of such a patent has been specifically affirmed by at least one Federal court.

West *ex.* Hitchcock, 19 App. D. C., 333, was an action of mandamus against the Secretary of the Interior to require his approval of the selection of certain land made by the relator under the warrant of a treaty between the United States and the Indian tribe of which the relator alleged himself to be a member. The petition stated that the relator was a member of the tribe and set out the taking by him of all the steps necessary to entitle him to the land and to the approval of his selection by the Secretary. Demurrer to the petition admitted the truth of all these averments, and relied solely upon the immunity of the Secretary from the control of the courts

in his official action respecting the disposal of public land. The case was, therefore, identical in principle with the present one, the Department admitting the right of the relator to the land but denying the power of any court to compel the passage of title. The Court of Appeals of the District of Columbia held that it was a proper case for mandamus. Mr. Justice Morris, on behalf of the court said:

> "By a long and well-known series of cases in the Supreme Court of the United States, from that of Marbury *vs.* Madison, 1 Cranch, 137, to that of Roberts *vs.* United States, 176 U. S., 221 the law of mandamus has been well settled, so far as it concerns the authority of the courts of the District of Columbia to issue that writ to the head of a department of the Federal Government or the chief of a bureau upon whom some special duty has been devolved by law. These decisions have firmly established the doctrine that the writ of mandamus will be issued to compel the performance of a ministerial duty by such officer, but that it will be refused when the duty required of him involves only the exercise of judicial or quasi judicial discretion. The only difficulty in any given case now is the application of the doctrine, and the determination of the question, whether the act, of which performance is sought, is of a ministerial or of a judicial character.
>
> "That question is greatly simplified in the present case by the concession of the demurrer of the appellee that the facts stated by the relator in his petition, and which constitute the foundation of the relator's cause of action, are true as therein stated.
>
> "It is conceded that the relator has taken all the steps and complied with all the requirements

of the law to entitle him to his allotment. * * * The sole defense interposed by the appellee to the relator's right in the premises is the proposition, that the cause is one wherein the Secretary of the Interior was required to exercise judgment and discretion, that the control of Indian affairs is a political function vested by Congress in the Executive branch of Government, that the power to approve in this instance involved the power to disapprove, that this necessarily involves the exercise of judgment, that the refusal of the Secretary to approve the allotment amounts to a disapproval and rejection of it, and that any attempt to control his judgment therein would be an exercise of appellate power which is not given to the courts.

"We think that this proposition in the present case is based upon a misapprehension of the law and cannot be sustained.

"The fact that an act which mandamus seeks to compel is the culmination of a series of proceedings of a judicial or quasi-judicial nature, or is an act in the course of such proceedings, does not exempt it from judicial control by the courts through the writ of mandamus, when the officer or person charged to perform it, arbitrarily and without just legal cause, refuses such performance. This is true in reference even to strictly legal proceedings. For a trial court to settle a bill of exceptions or to approve an appeal bond is a judicial function requiring the exercise of judgment and discretion; and yet, if the judge holding the trial court arbitrarily refuses to settle such bill of exceptions, when in due form it has been duly tendered to him, or arbitrarily refuses to approve such appeal bond, when it has been duly submitted to him for ap-

proval and is in all respects satisfactory and subject to no reasonable objection, it is elementary law, which requires no elaboration and no citation of authority for its support, that, while his judgment may not be coerced, the performance of his duty may be required of him by means of the writ of mandamus. Indeed it may be laid down, as a general rule, that, while the judgment of a judicial officer, or of an officer charged with the performance of a judicial or quasi-judicial duty, will not be controlled through the writ of mandamus, and this writ will not be used as a means for the review of the exercise of such judgment, yet any act required by law to be done, whether in the course of judicial proceedings or otherwise, may be compelled by mandamus from a superior tribunal, or a tribunal of general jurisdiction, as the case may be, when its performance is withheld by a mere arbitrary exercise of power without just cause. * * *

"Now, if this be the case in strictly judicial proceedings, it is even more so in regard to the functions of executive affairs in the performance of acts wherein individual citizens are interested. To grant a patent for lands, or for an invention in the arts or the discovery of the sciences, is a quasi-judicial function of the highest nature, which has been committed by Congress to the executive officers of the Government; and the granting or refusing of such a patent cannot, ordinarily, be questioned in the courts. But, when all the proper pre-requisites have been complied with, and all the preliminary steps have been taken whereby a party has in law become entitled to a patent, and nothing remains to be done but to issue a patent, it is well settled that such patent may not arbitrarily and without just

cause be withheld, and that its execution and delivery may be enforced by the writ of mandamus. Butterworth *vs.* Hoe, 112 U. S., 50. United United States *vs.* Schurz, 102 U. S., 378. Dunlap *vs.* Black, 128 U. S., 40. It has been well said that, under our republican government, that there is no place for the exercise of arbitrary power."

United States *ex rel.* Levey *vs.* Stockslager, 129 U. S., 470, was a petition for a writ of mandamus to require the Commissioner of the General Land Office to issue to the relatrix certain certificates of location to which she supposed herself entitled under an Act of Congress. The answer of the Commissioner stated his reasons for refusing to issue the certificates demanded, and the controversy was considered on its merits as a question of law.

These authorities are submitted as establishing the proposition, that the power of the Interior Department over rights in public land is not unlimited, even before the issue of the patent. In a proper case, the facts which make the claimant's title being established and undisputed, the action of the Department upon that title is not mere matter of discretion but of strict legal right. In such a case, which is, of course, of only exceptional occurrence, the reasons which ordinarily preclude interference by the courts cease to obtain, and the case falls within the well settled principle that duties of a ministerial nature may be judicially enforced.

In the present case, accordingly, the fact that the State has no patents for the lands involved is no objection to the relief which she prays against the threatened impairment and probable destruction of her title. That patents have not issued is due to the

failure of the defendants to perform that duty in the premises, and, even in a more doubtful case, they could not rely upon their own dereliction to defeat a right which would otherwise be a perfect legal title. The State's right, even as it stands, is, as been pointed out, of an exceptional character in respect of its availability against the defaults or errors of the Department. Indeed it has been declared, specifically of this title under the swamp land grant that it can not be defeated or impaired by the omission of the Department to furnish the proper evidence of title to the State:

> Railroad Co. *vs.* Smith, *supra.*
> Wright *vs.* Roseberry, *supra.*
>
> "But the title of the State to the lands, they being swamp and overflowed, cannot be defeated, nor in any way impaired, by the delay or refusal of the Secretary of the Interior to have the required list made and patent issued. The State and her grantees might be embarrassed in the assertion of her rights, but no other consequences would follow."
>
> Irwin *vs.* Savings Union, 136 U. S., 578.

If, therefore, any title, or any degree of rightful property, short of title by patent, will warrant the interference of the judiciary for its protection against unlawful attack, it is the title vested in the State under the swamp land grant. To say that, because the State has no patents, she has no standing here to protest against injury, is equivalent to saying that, in no possible case before the issue of patent, can the unlawful acts of the Department be controlled or prevented. If that is so, then some official suc-

cessor of the present defendants may, in some such case as this, be guilty of acts which are avowedly wanton and malicious, or even confessedly corrupt; he may, as part of such malicious or corrupt purpose, wilfully and without other cause, refuse to issue a patent to an applicant clearly and admittedly entitled to it; and, because the patent is thus withheld, the situation is without remedy. The present contention, that a Departmental decision which is plainly erroneous, is exempt from judicial correction, can not logically or consistently stop short of the extreme case supposed.

This Court, at any rate, has never gone to any such length. On the contrary, as has been pointed out, it has even left open the question whether the execution of a patent may not be enforced by mandamus. All the cases, in which the general rule has been applied, have been instances in which that rule was applicable, upon principles herein stated, and which differed from the present case in material respects. And the rule itself has been stated only as a general rule, and with such qualifications as will admit of exceptions upon the exceptional state of facts disclosed in this bill. It has even been expressly declared that such an exception may be admitted. In Brown *vs.* Hitchcock, *supra*, which will be strongly relied upon as against the present position of the complainant State, the Court, while holding that, generally, the jurisdiction of the Department is exclusive until the issue of patent, said:

> "We do not mean to say that cases may not arise in which a party is justified in coming into the courts of the District to assert his rights as against a proceeding in the Land Department, or when the Department refuses to act at all. United States *vs.* Schurz, *supra*, and Noble *vs.*

Union River Logging Co., 147 U. S., 165, are illustrative of these exceptional cases. * * *

"But what we do affirm and reiterate is that power is vested in the Departments to determine all questions of equitable right or title, upon proper notice to the parties interested, and that the courts must, *as a general rule*, be resorted to only when the legal title has passed from the Government."

Noble *vs.* Union River Logging Co., 147 U. S., 171, cited in the foregoing passage, was a case in which the Logging Company brought a bill in equity to restrain the Secretary of Interior from cancelling the approval of a map, under which, by virtue of a statute, the complainant was vested with a right of way in certain public land. The right of the complainant was dependent solely upon the grant of the statute, as is the present title of the State in the lands here concerned, and there was no patent or other act purporting to convey any other or better title than that passed by the Statute. The defense of the then Secretary, Mr. Noble, was identical with that set up by the present demurrer, namely, that his proposed act was within his official authority and therefore not examinable in any court. It was held that, under the circumstances, the Secretary had no power to impair the vested right of the complainant company, the opinion stating:

"We have no doubt the principle of these decisions applies to a case wherein it is contended the act of the Head of a Department, under any view that could be taken of the facts that were laid before him, was *ultra vires*, and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much sub-

ject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do."

Again, in the same opinion, it is said:

"This distinction has been taken in a large number of cases in this court, in which the validity of land patents has been attacked collaterally, and it has always been held that the existence of lands subject to be patented was the only necessary prerequisite to a valid patent. In the one class of cases, it is held, that, if the land attempted to be patented had been reserved, or was at the time no part of the public domain, the Land Department had no jurisdiction over it and no power or authority to dispose of it. In such cases, its action in certifying the lands under a railroad grant, or in issuing a patent, is not merely irregular, but absolutely void, and may be shown to be so in any collateral proceeding."

Citing Polk's Lessee *vs.* Wendell, 9 Cr., 87.
Patterson *vs.* Winn, 11 Wheat, 380.
Jackson *vs.* Lawson, 10 Johnson, 23 and other cases.

In this case, the bill shows that the lands which the State seeks to protect are not subject to be patented. Lands so granted under the swamp land acts are reserved, even before the issue of patent:

Railroad Co. *vs.* Fremont Co., 9 Wall., 89.

The action of the Land Department in patenting these lands to Indians will, therefore, be *ultra vires* and beyond the scope of the Secretary's authority,

and the case comes within the decision in the Noble case, which is, in Brown *vs.* Hitchcock, recognized as one of the exceptions to the general rule which accords to the officers of the Land Department immunity from suit.

The relief prayed in the bill is thoroughly consistent with the existence of legal title in the United States and with the continuance of that title in the United States. The action is not mandamus or other proceeding demanding the issue of title or any other affirmative act on the part of the Department. It is not sought to dispossess the Indians, or in any manner to embarrass the Government in its Indian policy or any other policy. There is no attempt to terminate or curtail the jurisdiction of the Land Department over the lands or to transfer to the courts any controversy over matters of fact or any issues requiring the examination of evidence. There is no prayer, even, that the defendants be required to examine the proofs submitted in support of the State's claim and to adjudicate the character of the land, though it is the clear legal right of the State to insist that this shall be done. So far as the prayers of the bill go, the Department need never act upon the list of swamp land selections, the Indians may continue indefinitely in possession of the lands, provided the character of their tenure and the manner of their occupancy be not altered to the prejudice of the State's title, and the legal title may remain in the United States until the present Secretary or some one of his successors shall find it convenient to consider the character of the lands selected.

So far from seeking to oust the jurisdiction of the Department, the very prayer of the bill is that the Department shall retain and exercise its jurisdiction over the lands. Nor is any decree sought which will, in the slightest degree, control the discretion of the

Secretary in the administration of the grant, or even advise his judgment in respect of the manner in which, or the principles upon which, or the evidence and rules by which, he shall discharge any of his duties growing out of the granting Act. His general authority to interpret and apply that Act and all other statutes is left as it stands. The only respect in which any interference with the Departmental authority could result is that the Department is prevented from acting upon a construction of the grant which is clearly erroneous and goes directly to destroy the rights vested in the State under the grant. If the Department should be left at liberty to carry into effect its present construction of the Act of 1860, it would not be the administration of the grant but the defeat of the grant, to the extent of the acreage involved in this proceeding. As the appropriation of the granted lands to uses inconsistent with the grant is not incident to the Secretary's jurisdiction of the subject, his authority and his discretion in the premises can not be set up to prevent the correction of such an error on his part, which transcends the scope of his legitimate power in respect of swamp lands. The concession to the Department of jurisdiction and discretion to construe the grant entrusted to it for execution, does not imply liberty to execute the trust upon a construction which is antagonistic to and subversive of the trust itself.

All that is prayed is that the officers of the Department shall be restrained from making a disposal of these lands which will effectually and conclusively destroy the title of the State. The lands are concededly of swampy character and part of the grant to the State. The power, asserted by the Department, to withdraw them from the operation of the grant and to apply them to other uses, can not be maintained in point of abstract law. The sole ques-

tion, at this stage of the argument, is whether or not the Department can be restrained by any judicial authority from putting into effect this erroneous conception of its power in the premises. Independently of the peculiar immunities of the defendants by reason of their official character, such a bill as this would lie against them in their character as trustees, for the purpose of preventing a cloud upon the title of the complainant for the sake of avoiding multiplicity of litigation, and upon other equitable grounds. The official immunity of the defendants from control or advice by the courts is founded upon the provision afforded by the law for the correction of their possible errors by judicial action to be taken after the issue of the title from the United States. This the general remedy afforded by the law in such cases, in this case, is not only wholly inadequate and fruitless, but is actually defeated and taken away by the very action which it is sought to correct; so that it is a case, not of mere inadequacy, but of utter defect, of remedy if the defendants are permitted to patent the lands. Besides this, the general immunity from suit set up by the defendants extends only to matters of discretion in the administration of Departmental affairs and to matters within the exclusive jurisdiction of the Department. This case involves no controverted matters of fact, and whatever discretion is reposed in the defendants has been exhausted by their decision which is conclusive of the whole matter, so far as their authority extends. The only discretion set up by this demurrer is in regard to the construction of the Statute, and that construction, as has been submitted is clearly erroneous. The power to act upon an erroneous interpretation of law is not, upon the authorities cited, a part of that official discretion which is beyond the control of the judiciary. Even the issue of a patent may, when the facts

which entitle the applicant to a patent are conceded, be enforced by mandamus. Apart from this, the title which the State is admitted to have is a property right of the highest nature, and one which cannot be destroyed or impaired by the delay, neglect or ill advised action of the Land Department, even before the issue of patent. The want of patents in this case is, upon the admitted facts and in the light of correct principles of law, due solely to the neglect or error of the defendants themselves. The fact that the legal title remains in the United States, besides being one of which the defendants can not take advantage, is immaterial to the State's right to be protected in her property. The action which it is proposed at the Department is not in administration of the swamp land grant, but in contravention of the authority reposed in the Department. The relief prayed is not inconsistent with the jurisdiction of the Department but rather in affirmance of such jurisdiction. Whatever, therefore, may be the general immunity of the defendants from suit in respect of public lands remaining in the United States, the principles upon which that immunity rests fail in the present case, and the exceptional nature and circumstances of the matter here shown except it from the general rule.

V.

POINTS SUGGESTED BY DEFENDANT'S BRIEF.

Some considerations and cases mentioned in the brief of opposing counsel may be briefly noticed.

The Act of March 2, 1901, which was considered and acted upon in Minnesota *vs.* Hitchcock, *supra*, is mentioned by defendants' counsel as the ground of jurisdiction in that case, and the absence of a similar

statute applicable to the present case is supposed to be fatal to the jurisdiction of this Court.

The Act cited was not jurisdictional in its nature, and was not so accepted by the Court in that case. The original jurisdiction of this Court can not be enlarged or restricted by any Act of Congress, nor can the general Federal jurisdiction, as defined by the Constitution be extended by legislation. The most that the statute in question could do was so to alter the condition of the Minnesota case that it would become one of a character within the Constitutional definition of the judicial powers of the Government; and this Congress did by creating an interest in the United States, thereby making the case one to which, as the Court held, the United States was a party. The Act was not at all the source of jurisdiction, but merely the means to bring the case within the existing jurisdiction of the Court as bounded by the Constitution.

The present controversy requires no such legislative assistance to become one within the jurisdiction of the Federal judiciary, being in its essential nature precisely such a case as Minnesota *vs.* Hitchcock became when the Statute created and declared the United States a party in interest. Here, without the aid of statute, the whole interest in the lands is the United States, if the contention of the defendants be correct; while, if the theory of the bill is sound, the legal interest is in the Government and the equitable in the State. In neither aspect, nor upon any possible inference from the averments of the bill, can any interest be attributed to any third party, the Indians having no legal or equitable title, and whatever pretensions they may have in the premises being due solely to the gratuitous and unauthorized promises of the defendant officers of the United States. Legislation to make the United States a competent party

would, therefore, be as superfluous in this case as it was necessary in that of Minnesota.

As affecting the question of parties, the same Act of 1901 is also significant, since it implies that the Indians were not necessary parties to the bill in Minnesota *vs.* Hitchcock. If they had been such parties, the Act would have been unconstitutional, as warranting a proceeding intended to deprive them of their property without notice to them and without opportunity to be heard, the prime essentials of due process of law. The Indians to be affected by the decree in that case were, it must be observed, much better entitled to notice than those concerned in the event of the present proceeding. Those Indians claimed under treaty stipulations, in virtue of which the land was to be sold and the whole of the proceeds applied to the use of the Indians. They had, therefore, the whole equitable title, only the naked legal title being in the United States, which fact was the one objection to the Federal jurisdiction which the Act of 1901 was required to remove. In this case, on the other hand, the Klamaths and allied bands have no interest whatever, legal or equitable in the fee simple which is the subject of the suit, their only right being the transitory one of occupancy and their allotments creating only an unauthorized expectancy. If the presence of the Minnesota Indians could be dispensed with, whether with or without statute, in a course which might result in the destruction of their vested property rights, then, *a fortiori*, whether with or without statute, the Indians mentioned in this bill may be likewise ignored in a proceeding which touches no legal or equitable interest of theirs.

The objection is made in the brief of defendants (p. 43), that the State does not appear from the bill to have made the selections in controversy within the

period limited by the Act of 1860, two years after the completion and confirmation of the surveys.

It does not appear that the surveys have, even yet, been completed and confirmed. From the fact that the lands are described by townships, ranges and sections, it may be inferred that the surveying has sufficiently progressed to enable such designation to be made; but that does not import that the surveys are completed. Still less does it import that the surveys have been confirmed; and even less than that does it afford any presumption that there has been any notice of that fact given to the Governor of Oregon. The fair inference is, that the bill omits to aver that the selections were made within two years after completion and confirmation of the surveys and notice to the Governor, because none of these facts has yet occurred.

The bill, however, does show, through recitals made by both the Commissioner and the Secretary in their respective decisions, that the Commissioner was, on January 4, 1901, directed to notify the Governor of the progress of the surveys, and that the present selections were presented to the Surveyor General some time before November 17, 1902, the date of that officer's certificate (pp. 18, 19, 25, 92). The official declarations of both defendants, therefore, establish the fact of the selection of the lands and presentation of the State's claim well within two years from the earliest possible date of notice to the Governor.

This requirement, moreover, that the swamp land claim shall be asserted within two years after completion of the surveys, has been judicially declared to be merely directory and not mandatory, so that failure to select within the period limited is not fatal to the right of the State under the grant:

Gaston *vs.* Stott, 5 Oregon, 48.

The fact that neither of the defendants raised any

objection to the selections on this account, but both accepted and acted upon the list without mention of any undue delay in the presentation of it, imports either that the list was presented in the statutory time, or that both officers adopted the judicial construction of the granting act. Inasmuch as the objection, if it be valid, was not asserted at the proper time, it is too late, now that the complainant State is court on the grounds stated by the defendants, for the latter to shift to a new and additional ground of defense:

Railroad Co. *vs.* McCarthy, 96 U. S., 258.

In Leavenworth *vs.* R. R. Railroad Co. *vs.* United States, 92 U. S., 733, the lands had been a part of an Indian reservation, created by treaty with the Indians, for nearly forty years before the date of the grant. The granting act expressly excluded from its operation all lands reserved. The decision can have no application to a case like the present, where it is conceded that there was no reservation before the grant, and the lands were in the mere aboriginal condition.

Missouri *vs.* Railroad Company *vs.* Roberts, 152 U. S., 114, involved a tract of land which had been included in the same reservation by a treaty concluded in 1825, and which was claimed under the grant of school lands made to the State in 1861, the reservations being then and for many years thereafter in existence according to the original terms of their creation. It does not appear when the tract was surveyed, at which date the school grant would have attached if it could attach at all; but it was patented to the defendant in error as school land in 1871. Before that date, in 1866, Congress had granted to the plaintiff in error, the Railroad Com-

pany, the right of way under which the latter claimed, the grant being so phrased as to apply to land in the Indian reservation. The constitutional convention of the Territory of Kansas had proposed to the United States that the latter make to the contemplated State a grant of school land which should include "Indian reservations and trust lands." But Congress expressly refused to assent to this proposition, and, in lieu of the grant as requested, granted to the State sections "sixteen and thirty-six in every township if public lands."

These transactions were held to amount to an agreement between the State and the United States by which Indian lands were excluded from the school grant; and the case was distinguished on that ground from the usual grant which, as was conceded, would carry the fee in lands subject to Indian occupation. The opinion reads:

> "This rejection by Congress of the original claim of Kansas to the school lands in townships sixteen and thirty-six, and its subsequent abandonment by the State itself and the concession to Congress of the right of absolute control of the lands until such right should be extinguished by appropriate legislation, distinguishes the case materially from that of Wisconsin, which was considered in Beecher *vs.* Wetherby, 95, U. S., 517, and upon which the defendant in error principally relies."

In the present case, it appearing that the lands were not reserved before the date of the swamp land grant, and that there were never any such negotiations had as in the Roberts case, there is nothing to take the lands from the rule laid down in Beecher *vs.* Wetherby, and the Roberts case has no application to the question presented by the bill.

The proviso, quoted by the Court in the Roberts case, attached to the Act of Congress of 1861, admitting Kansas to the Union, while somewhat similar in language to the proviso in the Act of 1848, upon which the Department decision in this case relies, was altogether different in its purpose and effect. The proviso attached to the Act of 1861 was drawn for the express purpose of negativing the claim and proposal asserted on behalf of the State to a grant of lands in Indian reservations; it applies by its terms to the constitution of the State which was, by the same Act, approved; and it excludes any claim on the part of the State to interfere with Federal control of such lands. The proviso in the Act of 1848, on the other hand, is limited by its terms to the other provisions of the same Act; it has not the remotest reference to any actual or contemplated grant of lands to the Territory then established or to the State thereafter to be erected; and it can not affect the construction of the Act of 1860, which, twelve years later, granted to the new State the swamp lands with no exceptions or restriction having regard to the legislation of 1848.

The other cases upon defendants' brief seem to be quite consistent with the propositions herein advanced, and some of them appear rather to sustain the present argument of the complainant.

For these reasons it is submitted that the demurrer to the complainant's bill should be overruled.

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FILE COPY.

No. 16.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE STATE OF OREGON, COMPLAINANT,
v.
ETHAN A. HITCHCOCK, SECRETARY OF THE INTERIOR, and WILLIAM A. RICHARDS, Commissioner of the General Land Office.

BRIEF AND ARGUMENT FOR DEFENDANTS ON DEMURRER TO BILL OF COMPLAINT.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE STATE OF OREGON, COMPLAINANT, v. ETHAN A. HITCHCOCK, SECRETARY OF THE INTERIOR, and WILLIAM A. RICHARDS, Commissioner of the General Land Office.	Original No. 16.

BRIEF AND ARGUMENT FOR DEFENDANTS ON DEMURRER TO BILL OF COMPLAINT.

STATEMENT.

This is a suit in equity instituted in this court by the State of Oregon against Ethan A. Hitchcock, as Secretary of the Interior, and William A. Richards, as Commissioner of the General Land Office, and is now before the court on a demurrer filed by the defendants to the bill of complaint.

The main object and purpose of the action is to have the court declare that the State of Oregon, under the provisions of the act of March 12, 1860 (12 Stat. L., 3), which extended to the State of Oregon in modified form the provisions of the act of September 28, 1850 (9 Stat. L., 519), entitled "An act to enable the State of Arkansas and other States to reclaim the 'swamp

lands' within their limits," is the owner of and entitled to a patent for 92,378.09 acres of land within the Klamath Indian Reservation, in said State.

The pertinent and ultimate facts in the order in which they are pleaded are substantially as follows:

That defendant Hitchcock is a citizen of Missouri and defendant Richards a citizen of Wyoming (p. 1), and that Oregon was admitted into the Union February 14, 1859 (p. 2).

The bill then recites the provisions of the acts of September 28, 1850 (9 Stat., 519), and March 12, 1860 (12 Stat., 3), (pp. 2, 3, and 4). That when Oregon was admitted and when the act of March 12, 1860, was passed the United States was the owner of a large body of land in Oregon, describing the same, "subject to be granted by the United States, and that no part of the same had been or was reserved or dedicated to any public use, nor had any reservation of any part of the same been made or created, and no part of the said lands had been sold, or bargained to be sold, or otherwise disposed of * * * and * * * were * * * free * * * of any claim * * * excepting such right to the temporary use and occupancy * * * as belonged to certain Indian tribes" (pp. 4 and 5).

This right of occupancy, as stated and defined in the bill, was in the Klamath, the Moadoc or Modoc, and the Yahooskin tribes or bands of Indians, and was such as the Indians generally had enjoyed as aborigines from time immemorial, but by the sufferance of

the United States and subject at any time to be terminated by it (pp. 5 and 6). That by the treaty of October 14, 1864, which was ratified by the Senate July 2, 1866, and proclaimed by the President February 17, 1870 (16 Stat., 707), said tribes or bands ceded to the United States the tract of land above referred to, reserving to said Indians for their use, "until other direction in the premises should be given by the President," a smaller tract of land within the boundaries of the tract so ceded (pp. 7, 8). That the lands so reserved "constituted an Indian reservation," and since 1864 "has been occupied by the said tribes," and "is called the Klamath Indian Reservation." (p. 10.)

That about the year 1899 defendant Hitchcock, as Secretary of the Interior, claiming authority therefor under the act of February 8, 1887 (24 Stat., 388), entitled "An act to provide for the allotment of land in severalty to Indians on the various reservations, and extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," caused a portion of said reservation to be surveyed and divided into tracts, with the purpose to allot the same in severalty to the members of said tribes and to deliver to each Indian to whom an allotment should be made a patent therefor, and that as such Secretary he intends "to convey the title and fee simple to and in a large portion of the * * * Klamath Reservation to the several individual members of the said Indian tribes" (pp. 11 and 12).

That a large tract of the lands included within the Klamath Reservation was, on March 12, 1860, swamp and overflowed lands within the meaning of said acts of September 28, 1850, and March 12, 1860, and such swamp and overflowed lands were granted to the State of Oregon by the latter act (pp. 12 and 13). That in 1902 the State caused an examination to be made of the lands within said reservation to ascertain what tracts therein were swamp and overflowed on March 12, 1860, and in the same year ascertained that many tracts included therein were on said last date swamp and overflowed lands; and during the same year made a list of said tracts thereafter designated as list 82, and filed the same with the United States surveyor-general for Oregon, who found and certified that the evidence submitted was sufficient to satisfy him that all the tracts so listed were, on March 12, 1860, swamp and overflowed lands.

That the State thereupon selected and claimed said tracts so listed under said act of March 12, 1860, and requested the proper officer of the United States to consider the State's claim to said tracts; to examine the evidence so submitted and to ascertain whether the tracts were swamp and overflowed lands on the last-mentioned date (pp. 13, 14, and 15). That the area of the tracts described in said list amounts to 92,378.09 acres; that of said acreage there has been allotted to individual Indians "tracts amounting in area to 55,281.84 acres" (p. 15). List 82, containing a description of each tract so selected and claimed as

swamp land, is appended to the bill, marked "Exhibit A" (pp. 34 to 92, inclusive). That on March 12, 1860, all of said tracts were public lands, subject only to the original right of occupancy in said Indian bands (p. 16).

That on November 18, 1903, the Acting Commissioner of the General Land Office, having considered the claim of the State to the tracts described in said list 82, rendered a decision in which he denied and rejected the claim of the State "upon the ground solely that said lands, whether or not they were swamp or overflowed on the 12th day of March, in the year 1860, were not granted to the State by the act of Congress approved on that date, but were excepted from the grant made by the said act by reason of the fact that the said lands were on the said date occupied and inhabited by Indians;" and refused to consider any evidence in respect to the character of said lands as they existed on said date (pp. 17–18).

A copy of the decision of the Acting Commissioner, wherein said claim was rejected by him, is set forth in the bill (pp. 18, 19, 20); that thereafter an appeal was taken from the said decision to the Secretary of the Interior; that the Acting Secretary of the Interior rendered a decision on May 26, 1904, in which he affirmed the decision appealed from; that in and by said decision the said Acting Secretary "declined and refused to consider, examine, or inquire into the condition of the said lands existing on the said 12th day of March, in the year 1860, or to direct or authorize such consideration, examination, and inquiry to be

made by any of the officers of the Department of the Interior, or to examine any evidence offered by the said State, or otherwise, to prove what was such condition, or to consider, ascertain, determine, and certify whether or not the said lands were, on the 12th day of March, in the year 1860, swamp and overflowed lands" (p. 22). A copy of said decision is incorporated in the bill (pp. 23, 24, 25, and 26); that a motion for a review of said decision was, in June, 1904, made by the State, and September 17, 1904, said motion was denied by the Acting Secretary of the Interior (pp. 26, 27).

That defendant, Hitchcock, as Secretary of the Interior, has directed the defendant, Richards, as Commissioner of the General Land Office, to proceed with the allotment to the said Indians of lands included in said list 82, and to issue patents for the lands so allotted, but that "no patents for any of the said lands have actually been issued" (p. 28).

That said reservation contains 872,186 acres (p. 29); that deducting the tracts described in said list 82 there remains an area of 779,807.91 acres. That in 1902 the number of Indians individually to share in the allotment was 1,141, having "at their disposal for such allotment sufficient lands to allow to each of said Indians the maximum area allottable by the said statute providing for such allotments and but little less than 600,000 acres additional, exclusive of the swamp and overflowed lands herein mentioned," and described in said list 82 (p. 30). That the lands so selected by the State and allotted to the Indians "are of the value or more than $55,281.54."

The bill prays in effect as follows:

1. That the defendants be perpetually enjoined from allotting any of the lands described in such list 82 or from issuing patents to any part of said lands "until and unless" the Secretary of the Interior "shall first * * * have caused due and just examination and proper inquiry to have been made to ascertain whether the said lands so proposed to be allotted and patented were, on the 12th day of March in the year 1860, swamp and overflowed lands, * * * and upon proper evidence have decided and adjudicated that the tracts of the lands so proposed to be allotted and patented were not of such character on said day."

2. That a decree be entered declaring the title of all tracts in list 82 to be in the State of Oregon, subject only to the right of temporary and terminable occupancy in the Indians at present occupying and inhabiting said reservation, and not subject to be divided by any allotment, patent, etc. (p. 32).

QUESTIONS RAISED BY THE DEMURRER.

The questions raised by the demurrer and insisted upon by the defendants are as follows:

1. That the case does not belong to that class wherein this court has original jurisdiction.

2. That the complainant has no interest in the subject-matter of the action.

3. That neither of the defendants has any interest in the subject-matter of the action.

4. That persons whose interests would be affected by a decree are not made parties; and if made parties, the jurisdiction of the court would be defeated.

5. That the action is legal and not equitable in character.

6. That the matters complained of are not of judicial cognizance.

ARGUMENT.

I.

ORIGINAL JURISDICTION.

THE CASE DOES NOT BELONG TO THAT CLASS WHEREIN THIS COURT HAS ORIGINAL JURISDICTION.

This point is presented by paragraph "first" of the demurrer, which is as follows:

> That this court has no jurisdiction of either the parties to this suit, or the subject-matter thereof, because it appears, on the face of said bill of complaint, that the matters set forth therein do not constitute, within the meaning of section 2, Article III, of the Constitution of the United States, a controversy such as confers upon this court original jurisdiction.

The judicial power belonging to the United States is conferred by Article III of the Constitution, and its limits are defined by the second section.

So far as Article III is pertinent to the present question, it reads as follows:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to con-

troversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

The bill alleges, among other things, in effect, that defendant Hitchcock is a citizen of the State of Missouri, and that defendant Richards is a citizen of the State of Wyoming. It would therefore appear that complainant relies upon the following clauses in said section 2 as authority for the original jurisdiction of the court, viz:

> The judicial power shall extend to all cases, in law and equity * * * between a State and citizens of another State.
>
> In all cases * * * in which a State shall be a party, the Supreme Court shall have original jurisdiction.

The mere fact that the State of Oregon is the complainant is not conclusive that the court has original jurisdiction. (See Jurisdiction and Procedure of the

United States Supreme Court, by Hannis Taylor, p. 53, sec. 30, and authorities there cited.)

The latest expression of opinion in respect to the original jurisdiction of this court where a State is complainant and as to the force and effect of the language used in the first and second paragraphs of section 2 of Article III of the Constitution is found in the decision in the case of *Minnesota* v. *Hitchcock* (185 U. S., 373), a suit in equity instituted in this court by the State of Minnesota against the defendant Hitchcock, as Secretary of the Interior, and Binger Hermann, as Commissioner of the General Land Office, to enjoin them from selling sections 16 and 36 in what had been known, prior to January 14, 1889, as the Red Lake Indian Reservation in Minnesota. The State claimed title to the sections under its school-land grant, while the defendants insisted that said sections 16 and 36 had been appropriated and set apart for certain Indians prior to said grant and had never become subject to it. There the action was the same as the one here, in respect to the relief demanded. The lands involved in that suit, however, were claimed by the State as "school" lands; while here the lands involved are claimed by the State as "swamp" lands.

In that case the court said (p. 383) that the question of jurisdiction was not "finally settled by the fact that the State of Minnesota" was a party to the litigation, but that it must further appear that the case was one "to which by the first paragraph" of said section of Article III of the Constitution "the judicial power of the United States extends."

In that case the court held it had original jurisdiction under that clause in the first paragraph which extends the judicial power to controversies "to which the United States shall be a party" because by the act of Congress of March 2, 1901 (31 Stats., 950), the Government had assumed a personal responsibility in regard to the subject-matter of the action and had consented to be sued in respect thereto in this court.

The act apparently was passed for the purpose of obtaining a speedy determination of the claimed rights of Minnesota to the sections 16 and 36 within the Red Lake Indian Reservation. Omitting the enacting clause, it reads as follows:

> That in any suit heretofore or hereafter instituted in the Supreme Court of the United States to determine the right of a State to what are commonly known as school lands within any Indian reservation or any Indian cession where an Indian tribe claims any right to or interest in the lands in controversy, or in the disposition thereof by the United States, the right of such State may be fully tested and determined without making the Indian tribe, or any portion thereof, a party to the suit if the Secretary of the Interior is made a party thereto; and the duty of representing and defending the right or interest of the Indian tribe, or any portion thereof, in the matter shall devolve upon the Attorney-General upon the request of such Secretary.

This act refers only to lands commonly known as "school" lands, and has no applicability to any other

lands. Here the lands involved are alleged to be "swamp" lands, and are claimed by the State of Oregon under the swamp-land act.

As the court held it had jurisdiction, in the case of *Minnesota* v. *Hitchcock*, by reason of the act referred to, that case is not authority for the original jurisdiction of the court in this case.

As suggested in the decision in *Minnesota* v. *Hitchcock*, if this court has original jurisdiction of an action by reason of the fact that a State is a party, support must be found therefor in one of the following clauses of the first paragraph of section 2 of Article III of the Constitution, which extends the judicial power of the United States (1) "to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority;" (2) to controversies "to which the United States shall be a party;" and (3) to cases "between a State and citizens of another State."

In respect to the first and third clauses, the court, in *Minnesota* v. *Hitchcock* (p. 384), said that it was "unnecessary to the disposition" of the question of jurisdiction to consider their applicability, for the reason that in the opinion of the court the controversy was one "to which the United States," by reason of the personal responsibility assumed by it under the terms of the said act of March 2, 1901, "may be regarded as a party," and therefore the case was one which fell within the scope of the second clause.

Inasmuch as it would seem from the allegations in the bill, to the effect that the defendants are not citizens of Oregon but of other States, that complainant relies upon the third clause as authority for the jurisdiction of this court, the first question in logical order presented for discussion is: Does said clause authorize the jurisdiction invoked?

The defendants contend that it does not, because (1) neither of them has any personal interest as an individual and citizen in the subject-matter of the controversy, and (2) in case either should die or resign a citizen of Oregon might be appointed as his successor.

As decisive of the question, the court's attention is invited to the following language used in the decision in *Minnesota* v. *Hitchcock*, at pages 383–384, in regard to said third clause:

> To bring the case within the first [third] clause referred to, the bill alleges that the defendant, Ethan Allen Hitchcock, Secretary of the Interior, is a citizen of Missouri, and the defendant, Binger Herman, Commissioner of the General Land Office, a citizen of Oregon, and therefore it is said that the case comes strictly within the language of the first paragraph in that there is presented a controversy between a State, Minnesota, and citizens of other States. To that it may be replied that there is no real controversy between the State, the plaintiff, and the defendants as individuals; that the latter, merely as citizens, have no interest in the controversy for or against the plaintiff; that in case either of the defendants should

> die or resign and a citizen of Minnesota be appointed in his place, the jurisdiction of the court would cease, and this although the real parties in interest remain the same.

The term "first clause," as used in the above language of the court, as is plainly seen, refers to that clause which reads "between a State and citizens of another State."

In accordance with the order in which the facts are pleaded, the next clause of the paragraph to be considered is the first, which extends the judicial power "to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority."

In this connection it may be said that, from the face of the bill, this case appears to arise under and involve the provisions of the swamp-land act of 1850 (9 Stat. L., 519) as extended in modified form to the State of Oregon by the act of March 12, 1860 (12 Stat. L., 3), and the provisions of the Indian treaty concluded October 14, 1864, proclaimed February 17, 1870 (16 Stat. L., 707), and of the act of February 8, 1887 (24 Stat. L., 388), entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes."

Does the fact that the State is the party complainant, coupled with the fact that the case arises under laws of Congress and a treaty with the Indians, authorize this

court to assume original jurisdiction under the first clause of the paragraph?

In regard to this question there seems to be no direct authority. It does not appear ever to have been squarely presented and passed upon. In the case of *Minnesota* v. *Hitchcock*, supra, it was not suggested by counsel for the State as ground for jurisdiction. In that case, however, the court observed (p. 384):

> It may be said that if it were held that this court has original jurisdiction of every case of a justiciable nature in which a State was a party and in which was presented some question arising under the Constitution, laws of the United States, or treaties made under their authority, many cases, both of a legal and an equitable nature, in respect to which Congress has provided no suitable procedure, would be brought within its cognizance.

The case of *California* v. *Southern Pacific Company* (157 U. S., 229) might be said to have been one which arose under the act of Congress of September 9, 1850 (9 Stat., 452), admitting California into the Union, in that by such admission under that act the State's title to the subject-matter of the suit arose. The original jurisdiction of this court was invoked by the complainant, however, on the ground that the case was one between a State and a citizen of another State—Kentucky. In disposing of the case the court found and held that two citizens of California had such interests in the subject-matter as would be affected by a decree, and dismissed the bill for want of those

parties, who could not be joined "without ousting the jurisdiction."

Mr. Justice Harlan filed a dissenting opinion, in which Mr. Justice Brewer concurred. The dissenting justices did not express the opinion or suggest that the court might have jurisdiction under the first clause of the paragraph, but the Chief Justice, who delivered the opinion of the court, said (p. 261):

> If, by virtue of the subject-matter, a case comes within the judicial power of the United States, it does not follow that it comes within the original jurisdiction of this court. That jurisdiction does not obtain simply because a State is a party. Suits between a State and its own citizens are not included within it by the Constitution, nor are controversies between citizens of different States.

In *Minnesota* v. *Northern Securities Company* (184 U. S., 199) rights were asserted by the State under the aforesaid act of March 12, 1860 (p. 200), and the act of Congress of July 2, 1864 (p. 209); and it was held that the court was without original jurisdiction because citizens of Minnesota were indispensable parties, and if made parties thereto the jurisdiction of the court would be ousted. It was not suggested by the court that it might have jurisdiction for the reason that rights were affected under a law or laws of Congress. The fact that, since the organization of this court and until the decision in *Minnesota* v. *Hitchcock*, supra, the question was not even raised would indicate

that in the opinion of the bar, at least, this court did not have original jurisdiction in the case where a State was a party plaintiff, simply because the controversy was one which arose under the Constitution of the United States or a law or laws of Congress or of a treaty.

In this connection it may be said that Mr. Hannis Taylor, in his valuable treatise above referred to, does not intimate that this court might have original jurisdiction in a case wherein a State is party plaintiff if the controvesy was one which arose under the Constitution, or a law of Congress, or of a treaty.

Is the case one to which the United States is a "party" in the sense that the term is used in the second clause of paragraph 1, section 2, Article III of the Constitution?

While it is true that the legal title to the lands involved is in the United States (*Brown* v. *Hitchcock*, 173 U. S., 473), it has no greater substantial interest than it had in the lands involved in the case of *Minnesota* v. *Hitchcock*, supra. In that case the court held (p. 387) that the United States was "the real party affected by the judgment," notwithstanding that it might "be said that the United States had no substantial interest in the lands, * * * and if the case stood upon the construction of the treaty between the United States and the Indians there might be substantial force in the suggestion." "But," said the court, referring to the act of March 2, 1901 (31 Stat., 960), "Congress has, for

the Government, assumed a personal responsibility." The court further said, on page 388:

> The controversy is made by the act of 1901 one to which the United States is a party in interest, to be directly affected by the result, and, therefore, the case is within the first paragraph as one to which the judicial power of the United States extends.

A careful examination of that case leads irresistibly to the conviction that the court would not have decided that the United States was the real party in interest, and have taken jurisdiction, in the absence of the act of March 2, 1901, which applies only to "what are commonly known as school lands." (See Jurisdiction and Procedure United States Supreme Court—Taylor, p. 64, sec. 37.)

However, in the case of the *United States* v. *Rickert* (188 U. S., 432) it was held that the Government had such an interest in the controversy or in its subjects as entitled it to maintain the suit as party *plaintiff*. The relation of the United States to the subjects of that controversy was the same as in this, and the legal questions involved are similar in principle.

That suit was brought by the United States to restrain the defendant Rickert, as tax collector of Roberts County, S. Dak., from collecting taxes assessed against and levied in the years 1899 and 1900 upon certain improvements and personal property upon and used in the cultivation of lands in that county occupied by members of the Sisseton band of Sioux Indians in the State of South Dakota. The improvements and

personal property sought to be made the subject of taxation were situated on lands which had previously been allotted to the Sisseton band of Sioux Indians "under the provisions of the agreement of December 12, 1889, as ratified by the act of March 3, 1891 (26 Stats., 1035, 1036), and more particularly under section 5 of the general allotment act of Congress approved February 8, 1887 (24 Stats., 389)."

A demurrer was filed by the defendant to the bill of complaint, one of the grounds being "that the United States had no interest in the subject-matter of the suit." The Circuit Court sustained the demurrer. The United States failed to amend the bill and appealed to the United States Circuit Court of Appeals for the Eighth Circuit. That court made a certificate of certain questions to which it desired the instructions of this court, among them the following:

> Has the United States such an interest in this controversy or in its subjects as entitles it to maintain this suit?

The court answered this question as follows (p. 444):

> In view of the relation of the United States to the real and personal property in question, as well as to these dependent Indians still under national control, and in view of the injurious effect of the assessment and taxation complained of upon the plans of the Government with reference to the Indians, it is clear that the United States is entitled to maintain this suit. No argument to establish that proposition is necessary.

But if it were conceded that the United States is the real party in interest and would be directly and solely affected by the decree, the court is without jurisdiction because the Government can not be made a party *defendant* in any court without its consent, and consent has not been given in an action such as is here under consideration.

"The principle that the Government can not be sued without its consent," says Mr. Justice Miller, in *United States* v. *Lee* (106 U. S., 196, 207), "has never been discussed or the reasons for it given, but it has always been treated as an established doctrine."

In answer to the above it may be claimed by the State, as suggested in *United States* v. *Lee*, supra, that this doctrine is "limited to cases in which the United States are made defendants by name," and has no application to a case brought against an officer or agent of the United States who is charged with having committed acts injurious to the rights or property of plaintiffs or of threatening to commit such acts under color of his office.

But even though it be conceded that the doctrine is so limited, or that it has no application to a case like the one at bar, or that the defendants as officers of the Government are the proper parties to the action, this court, although it might have appellate, would not have original, jurisdiction. In such case the proper forum for the institution of the suit would be the supreme court of the District of Columbia. (See *United States* v. *Schurz*, 102 U. S., 378; *Union River Logging Com-*

pany, 147 U. S., 165, 171, and *Brown* v. *Hitchcock*, 173 U. S., 473, 477, 478.)

It is submitted, however, that an injunction against individuals as officers of the Government is limited to a suit such as is authorized by law and where the act enjoined is purely ministerial in character. (Taylor's Jurisdiction of the Supreme Court, *supra*, p. 78, sec. 48; *In re* Ayers, 123 U. S., 443, 506.) The acts here sought to be restrained are not ministerial in character. *Mississippi* v. *Johnson* (4 Wall., 475, 498; *United States* v. *Schurz*, 102 U. S., 378, 397, 403, 408).

II.

THE COMPLAINANT HAS NO INTEREST IN THE SUBJECT-MATTER OF THE ACTION.

This point is presented by paragraph "Third" of the demurrer, which is as follows:

> That the State of Oregon has not, and never had, any title, interest, or claim in or to the lands which are the subject-matter of the action, for the reason, as stated in the bill, that said lands, at the time of the passage of the swamp-land act of March 12, 1860, were unceded Indian lands in the possession of and occupied by the Klamath, Modoc, and Yahooskin tribes or bands of Indians, which possession and occupancy were recognized in and guaranteed to them by the act of Congress of August 14, 1848 (9 Stats., 323), and are yet unextinguished.

By the decision of the Acting Secretary of the Interior of May 26, 1904, which is set forth in the bill (pp. 23,

24, 25, 26), it appears that at the time of the enactment of the swamp-land grant, at the time of the admission of Oregon into the Union, and at the time the provisions of the swamp-land act were extended to Oregon, the lands involved were occupied by Indian tribes or bands and members thereof under their original right of occupancy.

It further appears from said decision, as set forth in the bill (p. 24), that by the act of August 14, 1848, entitled "An act to establish the Territorial government of Oregon" (9 Stat. L., 323), it was provided, among other things:

> That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to affect the authority of the Government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the Government to make if this act had never passed.

As it appears from the bill (pp. 7, 8, 9, 10, and 11), the lands in controversy, with the others of the tract of country covered by the Indian occupancy recognized and confirmed by the act of 1848, were, by the treaty of October 14, 1864, which was proclaimed February 17, 1870 (16 Stats., 707), between the United States and the Klamath and Moadoc and Yahooskin

bands of Snake Indians, ceded to the United States and were included in the reservation set apart as a residence for said Indians until otherwise ordered by the President.

Articles I, VI, and VII of said treaty read as follows:

> I. The tribes of Indians aforesaid cede to the United States all their right, title, and claim to all the country claimed by them, the same being determined by the following boundaries, to wit: Beginning at the point where the forty-fourth parallel of north latitude crosses the summit of the Cascade Mountains; thence following the main dividing ridge of said mountains in a southerly direction to the ridge which separates the waters of Pitt and McCloud rivers from the waters on the north; thence along said dividing ridge in an easterly direction to the southerly end of Goose Lake; thence northeasterly to the northern end of Harney Lake; thence due north to the forty-fourth parallel of north latitude; thence west to the place of beginning: *Provided*, That the following-described tract, within the country ceded by this treaty, shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians [and] held and regarded as an Indian reservation, to wit: Beginning upon the eastern shore of the middle Klamath Lake, at the Point of Rocks, about twelve miles below the mouth of Williamson's River; thence following up said eastern shore to the mouth of Wood River; thence up Wood River to a point one

mile north of the bridge at Fort Klamath; thence due east to the summit of the ridge which divides the upper and middle Klamath lakes; thence along said ridge to a point due east of the north end of the upper lake; thence due east, passing the said north end of the upper lake, to the summit of the mountains on the east side of the lake; thence along said mountain to the point where Sprague's River is intersected by the Ish-tish-ea-wax Creek; thence in a southerly direction to the summit of the mountain, the extremity of which forms the Point of Rocks; thence along said mountain to the place of beginning. And the tribes aforesaid agree and bind themselves that immediately after the ratification of this treaty they will remove to said reservation and remain thereon, unless temporary leave of absence be granted to them by the superintendent or agent having charge of the tribes.

* * * * *

ARTICLE VI. The United States may, in their discretion, cause a part or the whole of the reservation provided for in Article I to be surveyed into tracts and assigned to members of the tribes of Indians, parties to this treaty, or such of them as may appear likely to be benefited by the same, under the following restrictions and limitations, to wit: To each head of a family shall be assigned and granted a tract of not less than forty nor more than one hundred and twenty acres, according to the number of persons in such family; and to each single man above the age of twenty-one years a tract not

exceeding forty acres. The Indians to whom these tracts are granted are guaranteed the perpetual possession and use of the tracts thus granted and of the improvements which may be placed thereon; but no Indian shall have the right to alienate or convey any such tract to any person whatsoever, and the same shall be forever exempt from levy, sale, or forfeiture: *Provided*, That the Congress of the United States may hereafter abolish these restrictions and permit the sale of the lands so assigned if the prosperity of the Indians will be advanced thereby: *And provided further*, If any Indian to whom an assignment of land has been made shall refuse to reside upon the tract so assigned for a period of two years, his right to the same shall be deemed forfeited.

ARTICLE VII. The President of the United States is empowered to declare such rules and regulations as will secure to the family, in case of the death of the head thereof, the use and possession of the tract assigned to him, with the improvements thereon.

By the first section of the act of March 12, 1860 (12 Stat., 3), which extended the provisions of the swamp-land grant to Oregon, and referred to in the bill (pp. 3 and 4), it was provided:

> That the grant hereby made shall not include any lands which the Government of the United States may have reserved, sold, or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title to be made under the authority of the said act.

Under the original swamp-land act, September 28, 1850, *supra*, all swamp and overflowed lands which were "unsold at the passage" thereof were granted to the State of Arkansas and each of the other States then of the Union. In other words, only such swamp lands as had been *sold* at the date of the act were excepted. Under the act of 1860, however, the exception extends to "lands which the Government of the United States may have reserved, sold, or disposed of (in pursuance of any law heretofore enacted) *prior to the confirmation of title* to be made under the authority of the said act" (of 1850, as extended by the act of 1860).

In view of the provisions of the act of August 14, 1848, of the said proviso of the act of 1860, and of the stipulations contained in Articles I, VI, and VII of the treaty of 1864, the defendants contend:

1. That whatever right the State of Oregon could have acquired in or to any of the lands involved, within the exterior boundaries of the reservation so set apart by article 1 of said treaty, was and would continue to be subject and subordinate to the right of occupancy of the Klamath and Modoc tribes and Yohooskin band of Snake Indians, secured to them by the act of August 14, 1848.

2. That in view of the long-existing and recognized Indian rights in the tract of country of which these lands were a part, secured to them by the said act of 1848 and made the subject of specific provision and of definition by the treaty of 1864, the lands in question were "reserved" and "disposed of" within the terms and contemplation of the proviso to the act of 1860 and excepted from the grant to the State.

3. That the lands involved, within said exterior boundaries, are subject to allotment to the individual members of said tribes and band.

The swamp-land act is a grant "*in præsenti* to each State of lands within its limits of the character described." *Wright* v. *Roseberry* (121 U. S., 488, 496). "When identified, the title would become perfect as of the date of the act" (p. 500), and the United States passes to the State all the estate which it theretofore had in such lands (p. 503). See also *Tubbs* v. *Wilhoit* (138 U. S., 134, 137). The legal title only passes on delivery of a patent. *Brown* v. *Hitchcock* (173 U. S., 473).

The above propositions are therefore correlative. If, in 1864, the United States had such an interest in the lands involved as it could by treaty stipulations with the Indians agree should be set apart and be embraced in an Indian reservation for the use and occupancy of the Indians, it would seem that the Government had not passed to the State, by the act of March 12, 1860, all the estate which it theretofore had in such lands, and that it could by treaty stipulations with the Indians also agree that said lands might be allotted in severalty to the Indians.

In 1864 the Government had either no interest whatever in the lands, except as it held the fee simple in trust for the State, and no power to confer upon or recognize in the Indians even a right of occupancy, or it had absolute ownership and complete dominion over them, so far as the State was concerned, with power to dispose of them as it saw fit.

The right of occupancy to the lands involved, provided for in said treaty, has since the date thereof been exercised by the Indians unchallenged by the State. In fact, the bill in express terms at several places concedes such right (pp. 8, 10, 11, 16), and inferentially the authority of the United States to provide for such occupancy by the treaty of 1864.

The act of 1848 secured and preserved to the Indians all "rights of person and property" pertaining to them "so long as such *rights* shall remain *unextinguished by treaty* between the United States and such Indians," etc. As complainant's bill itself discloses, the "rights" recognized in and guaranteed to the Indians had not been *extinguished by treaty* at the date the provisions of the swamp-land act were extended to Oregon, March 12, 1860, or at the date of the aforesaid treaty, 1864, and have not yet been. On the contrary, pursuant to the reserving provisions of the act of 1848 (an enactment prior to the act of 1860), the lands were, by the treaty of 1864, further "disposed of * * * prior to the confirmation of title" under authority of the act of 1860.

While the bill alleges (pp. 6 and 7) that the lands in controversy were not reserved on March 12, 1860, this allegation is not admitted by the demurrer, for the reason that it is either a conclusion drawn from facts stated or a statement of the legal effect of the laws applicable to the facts pleaded. (See *Maese* v. *Hermann*, 17 Appeals D. C., 52, 59; *Cosmos Exploration Company* v. *Gray Eagle Company*, 190 U. S., 301, 308.)

If the said lands were *reserved* on March 12, 1860, then it follows that they were subject to further disposition by act of Congress or by treaty stipulations with the Indians. (*Minnesota* v. *Hitchcock*, 185 U. S., 373, 393–394.)

The first section of the act of 1848 not only recognizes the right of occupancy of the Indians to said lands, but guaranties such right until the same is extinguished by treaty with them. This act, in effect, set apart and withdrew said lands from sale or other disposal and included them within an Indian reservation, to the same extent as if the provisions of said first section of said act had been incorporated in a treaty with the Indians. (*United States* v. *Kagama*, 118 U. S., 375; *Spalding* v. *Chandler*, 160 U. S., 394, 403–404; *Minnesota* v. *Hitchcock*, 185 U. S., 373, 390.)

In this connection it is respectfully submitted that the rule which this court applies to an Indian treaty should govern the interpretation of section 1 of said act of 1848, namely: That the words employed therein should be construed most favorably to the Indians and not to their prejudice, and as they would be understood by the Indians. (*Worcester* v. *State of Georgia*, 6 Pet., 515, 582; *Choctaw Nation* v. *United States*, 119 U. S., 1, 28; *Minnesota* v. *Hitchcock*, 185 U. S., 373, 396; *United States* v. *Rickert*, 188 U. S., 432, 443; *Matter of Heff*, 197 U. S., 488, 499.)

The view which the legislative branch of the Government took of the rights and title of these Indians in and to the lands embraced in the aforesaid treaty of

October 14, 1864 (proclaimed in 1870), and here in question, is shown by the following extract from the report (No. 75) of the Committee on the Public Lands, submitted January 28, 1879, at the third session of the Forty-fifth Congress, with reference to a bill to adjust claims to certain of the lands under a grant, July 2, 1864 (13 Stat., 355), to the State of Oregon to aid in the construction of a military wagon road, in which no exceptions had been expressed:

> These reservation Indians are jealous and warlike. They made their treaty with the United States in good faith, they were without notice of any prior grant, and they naturally regard the title to the reservation as exclusively their own by virtue of the treaty of 1870. If they are made to understand that the United States had granted to individuals the title to these lands six years before it was stipulated by solemn treaty to set the same apart for them, their confidence in the Government will be impaired, and attempted removal will occasion most serious conflicts.

Assuming that the act of 1848 set apart said lands for the use and occupancy of the Indians, they were not only *reserved* from that time, but were appropriated to a public purpose; and no subsequent law will be construed to embrace them or operate upon them, and no exception be made of them, unless such subsequent law contains specific language to that effect. (*Wilcox* v. *Jackson*, 13 Pet., 498; *Leavenworth, etc., Railroad Company* v. *United States*, 92 U. S., 733, 745; *State of Minnesota*, 22 L. D., 388.)

INTERPRETATION BY THE LAND DEPARTMENT.

In construing the act of 1850, Mr. Secretary Vilas held, in State of Michigan (8 L. D., 308), that swamp lands were not *unsold* at the date of the passage of the act if at such time they were set apart as a military reservation, but passed to the State upon being relieved from such reservation.

Mr. Secretary Smith, in State of Minnesota (22 L. D., 388), held that lands were "reserved," as that term is used in the proviso of section 1 of the Act of March 12, 1860, if at the date of the act they were occupied by the Indians under treaty stipulations; and that such lands so occupied, even if swamp and overflowed at the date of the act, did not pass thereby to the State. In other words, that such lands so occupied "were reserved for the Indians pursuant to a law enacted prior to the swamp-land grant to the State of Minnesota."

He further held that to exclude such lands from the grant it was not necessary that they must have been set apart as a reservation by metes and bounds and called such under some act of Congress expressly authorizing them to be so reserved (p. 389). This is supported by *Spalding* v. *Chandler*, 160 U. S., 394, at pp. 403–404, reaffirmed in *Minnesota* v. *Hitchcock*, supra, p. 390.

In State of Minnesota (27 L. D., 418) Acting Secretary Davis held, in effect, that swamp and overflowed lands which were occupied by Indians under their original right of occupancy at the time of the passage

of the act were not excepted from the grant, but passed to the State for the reason that they were not "reserved" in pursuance of any law prior to the date of the act of March 12, 1860.

The distinction between the case of the State of Minnesota, 22 L. D., decided by Secretary Smith, and the State of Minnesota in 27 L. D., decided by Acting Secretary Davis, as is plainly seen, is that in the former the lands had been reserved by a treaty which was construed to be a law within the proviso of section 1 of the act of March 12, 1860, and said treaty was concluded prior to March 12, 1860. In the latter case, the lands were occupied merely under an original right of occupancy by the Indians, and there was no law which had confirmed that right and set aside the lands for the use and occupancy of the Indians.

In *Morrow et al.* v. *State of Oregon et al.* (32 L. D., 54) the Secretary of the Interior, Mr. Hitchcock, in construing the proviso to section 1 of the act of March 12, 1860, held, in effect, that if, prior to confirmation of title to the State, a right to a certain tract of lands contemplated by said act had been initiated under any law passed previous to March 12, 1860, such lands were excepted from the granting clause by said proviso. In that case it appears that one Amos Boyd, on a date subsequent to March 12, 1860, filed upon a certain tract of land in Oregon, under the preemption act of September 4, 1841, which tract was "swamp and overflowed" in character on March 12, 1860. The controversy arose between the State and the heirs

of Boyd in respect to the tract and was decided favorably to the latter. In the course of the decision the Secretary, among other things, said (pp. 64, 65):

> The act of March 12, 1860, *supra*, extending to Oregon the grant of September 28, 1850, *supra*, provided that "the grant hereby made shall not include any lands which the Government of the United States may have reserved, sold, or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of the title to be made under the provisions of said act."
>
> It is thereunder contended that lands to which a right by settlement or filing under the preemption law of September 4, 1841, had attached before issuance of patent under the swamp-land grant are excepted from that grant. Neither settlement nor filing under the preemption law, nor both such settlement and filing, constitute a sale or disposal of the land by the United States such as excludes it from this grant. Yosemite Valley case (15 Wall., 77); *Ham* v. *Missouri* (18 Howard, 126); *Cooper* v. *Roberts* (Id., 173); State of Utah (29 L. D., 418).
>
> The preemption claims of the heirs of Amos Boyd is for a portion of these lands. Boyd's preemption filing was canceled July 25, 1892, in the contest of the State against the same, but that decision was set aside December 19, 1893 (17 L. D., 571), and July 16, 1895, upon the submission of proof and payment of the purchase price, Boyd's heirs were allowed to make preemption cash entry and patent certificate

was issued to them. This perfection of the entry constitutes a sale and disposal of the lands embraced therein (*Carroll* v. *Safford*, 3 How., 441, 461; *Stark* v. *Starrs*, 6 Wall., 402, 418; *Aspen Consolidated Mining Co.* v. *Williams*, 27 L. D., 1, 16), and being made under a law (acts Sept. 4, 1841, 5 Stat., 453, and July 17, 1854, 10 Stat., 305) enacted prior to March 12, 1860, and also made prior to the confirmation of title in the State under the swamp-land act (State of Minnesota, 27 L. D., 418, 419), the lands embraced in such entry are excluded from that grant and the entry should be passed to patent if it be otherwise regular. If any other preemption entries shall be regularly perfected prior to the issuance of patent to the State, the lands covered by such entries will likewise be excluded from the grant to the State. The homestead, desert-land, and timber-culture laws under which some individual claims are asserted were all enacted after March 12, 1860, and therefor constitute no basis for the exclusion of lands from the swamp-land grant.

For the reasons herein given, your office decision of March 2, 1901, rejecting the claim of the State, is reversed, and all of the claims adverse to the State, excepting that of the heirs of Amos Boyd, and any other existing preemption claim which has been or may be perfected before this decision is carried into effect, are hereby rejected.

In an opinion given to the Secretary of the Interior by the Assistant Attorney-General for the Interior De-

partment, December 3, 1903 (32 L. D., 325), it was held as follows:

> Swamp and overflowed lands lying within sections 16 and 36 in the four townships in the White Earth Indian Reservation, in the State of Minnesota, ceded to the United States under the act of January 14, 1889, did not pass to the State under its grant of swamp lands made by the act of March 12, 1860, said sections being on that date in reservation for school purposes by virtue of the acts of March 3, 1849, and February 26, 1857.

In another opinion of the same date by the same officer, given to the Secretary of the Interior (*Ib.*, 328), it was held that—

> Lands swamp and overflowed, and rendered thereby unfit for cultivation, not reserved or granted by the United States on March 12, 1860, the date of the act granting swamp lands to the State of Minnesota, passed to the State under said grant, and are therefore excepted from the provisions of the act of January 14, 1889, relating to the disposition of the ceded Chippewa lands.

INTERPRETATION BY THE COURTS.

So far as swamp lands are concerned, the precise question now under discussion does not seem to have been passed upon by this court. The case of *Leavenworth, etc., Railroad Company* v. *United States*, 92 U. S., 733, is analogous in its facts, and the principle announced in the decision is applicable to and supports

the doctrine here urged. In that case the lands in controversy were situated in Kansas; they had been reserved by an Indian treaty concluded in 1825; they were also embraced within the first section of the treaty concluded September 29, 1865, which was amended by the Senate June 26, 1866, accepted by the Indians September 21, 1866, and proclaimed by the President January 26, 1867 (14 Stats., 687), which section reads as follows:

> The tribe of the Great and Little Osage Indians, having now more lands than are necessary for their occupation, and all payments from the Government to them under former treaties having ceased, leaving them greatly impoverished, and being desirous of improving their condition by disposing of their surplus lands, do hereby grant and sell to the United States the lands contained within the following boundaries. * * * And, in consideration of the grant and sale to them of the above-described lands, the United States agree to pay the sum of three hundred thousand dollars, which sum shall be placed to the credit of said tribe of Indians in the Treasury of the United States; and interest thereon at the rate of five per centum per annum shall be paid to said tribe semiannually, in money, clothing, provisions, or such articles of utility as the Secretary of the Interior may from time to time direct. Said lands shall be surveyed and sold under the direction of the Secretary of the Interior, on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws (including any act

> granting lands to the State of Kansas, in aid of the construction of a railroad through said lands), but no preemption claim or homestead settlement shall be recognized; and, after reimbursing the United States the cost of said survey and sale, and the said sum of three hundred thousand dollars placed to the credit of said Indians, the remaining proceeds of sales shall be placed in the Treasury of the United States, to the credit of the "civilization fund," to be used, under the direction of the Secretary of the Interior, for the education and civilization of Indian tribes residing within the limits of the United States.

March 3, 1863 (12 Stats., 793), Congress authorized the President to enter into treaties with the tribes of Indians residing in Kansas, looking to the extinction of their titles to lands. April 10, 1869, Congress passed a joint resolution (16 Stats., 55) providing for the disposition of all lands, except sections 16 and 36, contemplated by the aforesaid treaty of September 29, 1865. March 3, 1863 (12 Stats., 772), Congress passed an act granting lands to the State of Kansas for railroad purposes, etc., which was accepted by Kansas February 9, 1864, and the lands in controversy there were patented to the railroad company by the State in 1872–73. The railroad grant to the State of Kansas contains words of present grant, and provided (p. 773):

> That any and all lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose

> whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said road and branches through such reserved lands; in which case the right of way only shall be granted, subject to the approval of the President of the United States.

The Government brought suit against the railroad company to recover the lands in controversy, and contended that they did not pass to the State by the said act of 1863, but were "reserved," as that term was employed in the proviso just quoted. This contention was sustained by this court (92 U. S., 733). It held, among other things, at page 741, that the granting clause of the act of March 3, 1863, contemplated only such lands "as could be sold and enjoyed, and not those which the Indians, pursuant to treaty stipulations, were left free to occupy."

In that case Mr. Justice Field, with whom concurred Mr. Justice Swayne and Mr. Justice Strong, dissented. Later, however, in *Bardon* v. *Northern Pacific Railroad Company*, 145 U. S., 535, 543, Mr. Justice Field, in an opinion of the court delivered by him, said:

> Three justices, of whom the writer of this opinion was one, dissented from the majority of the court in the Leavenworth case; but the decision has been uniformly adhered to since its announcement, and this writer, after a much larger experience in the consideration of public-land grants since that time, now readily concedes that the rule of construction adopted—that,

> in the absence of any express provision indicating otherwise, a grant of public lands only applies to lands which are at the time free from existing claims—is better and safer, both to the Government and to private parties, than the rule which would pass the property subject to the liens and claims of others. The latter construction would open a wide field of litigation between the grantees and third parties.

There are no words used in the act of March 12, 1860, which indicate that Congress intended that its provisions should operate upon the lands set apart by the provisions of the first section of the act of 1848 for the use and occupancy of the Indians; and if, at the time of the passage of the said act of March 12, 1860, Oregon had been a Territory instead of a State and the grant had run to it as a Territory, it could not be successfully contended that swamp and overflowed lands occupied by the Indians with the consent of the Government passed to the Territory. If they would not have so passed if Oregon had been a Territory, and the grant had been to it as a Territory, upon what principle may it be maintained that they passed to Oregon after it became a State?

In *State ex rel. Kittel* v. *Jennings* (35 So. Rep., 986), the Supreme Court of the State of Florida held that a tract of land, part of section sixteen, which was swamp and overflowed in character September 28, 1850, passed to the State under its school-land grant, found in section 1 of the act of March 3, 1845 (5 Stat., 788), and not under the swamp-land act of Septem-

ber 28, 1850 (9 Stat., 519), although the section 16 of which said tract was a part had not been identified by the public survey at the date of the last-named act.

In the course of the opinion the court, on pages 994 and 995, among other things, said:

> We do not think the swamp-land grant of September 28, 1850, * * * should be so construed as to put the Government of the United States in the attitude of repudiating or in any wise limiting the provisions of the school land grant of March 3, 1845, which we regard as a compact made for a valuable consideration. We therefore do not think that the swamp-land grant of 1850 was intended to convey to the State of Florida any sixteenth section in the State or fraction thereof.
>
> We are therefore of opinion that, irrespective of any question of survey thereof, the selection and listing of the fractional section 16 in controversy as swamp and overflowed land, and the patenting thereof to the State as such land, were void and of no effect.

It seems, however, that it may be contended on behalf of the State that the act of 1848 has no application to Oregon as a State. The bill alleges on page 2:

> That by an act of Congress approved on the 14th day of February, in the year 1859, the said State of Oregon, complainant herein as aforesaid, was created a State and admitted as one of the States of the United States upon an equal footing with the other States of the Union in all respects whatever.

In reply to such contention, should the same be made, it is insisted upon the part of the defendants that the act admitting Oregon into the Union did not in letter or in spirit extinguish, or attempt to extinguish, the right of occupancy then enjoyed by the Indians to any lands within said State and which had been guaranteed by the act of 1848, as said act of admission contains no specific words showing such an intention on the part of Congress. And certainly, by said act, Congress did not intend to relinquish to the State the power and authority over said lands which were intrusted to it by that part of the third section of Article IV of the Constitution of the United States, which reads:

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State.

It is submitted, however, that the doctrine laid down in the case of the *Missouri, Kansas and Texas Railroad Company* v. *Roberts*, 152 U. S., 114, is a complete answer to any such contention. In that case there was involved a part of a section 16 within the State of Kansas. Roberts claimed title under a patent issued by the State in 1871, and the latter claimed the lands under its school land grant. The railway company claimed the tract as a part of its right of way under an act of Congress dated July 26, 1866, which granted to

the company unconditionally, for right of way, 200 feet in width. The tract in controversy was included in an Indian reservation by the treaty of 1825. Kansas was admitted into the Union by act of January 29, 1861, with the usual grant of sections 16 and 36 for school purposes, which act of admission contained the following proviso (which is similar in terms to the first section of the act of 1848):

> *Provided*, That nothing contained in the said constitution respecting the boundary of said State shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, * * * or to affect the authority of the Government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to make if this act had never been passed.

The court, in holding that the railroad company was entitled to the tract, said, among other things (p. 120):

> By this provision Congress reserved to itself the right to make all needful regulations for the government of the Indians, and for the use and disposition of their lands and other property. The Indians continued thereafter as previously in possession of the lands, and their rights, whatever their nature and extent, were not extinguished by anything in the act of admission of

the State into the Union, nor at the time of the grant of a right of way by the act of July 26, 1866.

It is difficult to understand how the decision in that case could have been otherwise, even in the absence of the provision of the act of 1866 referred to.

It would seem that the provisions of section 1 of the act of 1848 are as binding on the State of Oregon as though they had been incorporated in the act of Congress which admitted the State.

The second section of the act of March 12, 1860, *supra*, reads as follows:

> That the selection to be made from lands already surveyed in each of the States, including Minnesota and Oregon, under the authority of the act aforesaid, and of the act to aid the State of Louisiana in draining the swamp lands therein, approved March second, one thousand eight hundred and forty-nine, shall be made within two years from the adjournment of the legislature of each State at its next session after the date of this act. and as to all lands hereafter to be surveyed, within two years from such adjournment at the next session after notice by the Secretary of the Interior to the governor of the State that the surveys have been completed and confirmed.

It will be observed, from the face of the bill, that it fails to allege that in submitting list 82 the State complied with the provisions of said section.

III.

THE DEFENDANTS, NOR EITHER OF THEM, HAS ANY INTEREST IN THE SUBJECT-MATTER OF THE ACTION AS INDIVIDUALS.

This point is presented by paragraph "Tenth" of the demurrer, which is as follows:

> Because the said bill is exhibited against these defendants for several distinct and independent matters and causes which have no relation to each other and in which, or in the greater part of which, these defendants are not interested or concerned, nor is either of them.

This point, however, was incidentally discussed under the first point made, and for support reference is had to the case of *Minnesota* v. *Hitchcock*, 185 U. S., 373, where it was held, at page 387, that neither of the defendants in that case had any interest in the lands there involved. If it should be suggested by counsel for the complainant that the defendants have such an interest as officers of the Government as makes them parties, we reply to this contention that while it may be true that defendant, Secretary Hitchcock, as head of the Indian Bureau, might have such an interest as an officer as makes him a necessary party, yet the defendant Richards, as Commissioner of the General Land Office, has no connection whatever with the Indians or their affairs, and that there is misjoinder of defendants for that reason. Further, if defendant Hitchcock, as Secretary, is the proper party to be brought into court as defendant in order to enforce the claimed

rights of the State of Oregon, then, as heretofore suggested under the first point, the proper forum for the complainant in the first instance is the Supreme Court of the District of Columbia.

IV.

PERSONS WHOSE INTERESTS WOULD BE AFFECTED BY A DECREE ARE NOT MADE PARTIES. IF MADE PARTIES THE JURISDICTION OF THE COURT WOULD BE DEFEATED, IF OTHERWISE IT HAD JURISDICTION.

These points are presented by paragraphs "Second," "Fifth," "Sixth," and "Seventh" of the demurrer, and which read as follows:

> Because it appears from the allegations in said bill that the issues presented thereby do not arise between the State of Oregon and the United States, nor between said State and said defendants, or either of them, but arise, if at all, between said State and the Indians residing on the Klamath Reservation, who are not made parties herein, and which allegations, if true, do not concern the United States, nor the defendants, or either of them.
>
> Because it appears from the allegations in the bill that there are divers other persons who are necessary parties to the said bill, but who are not made parties thereto, and who are materially interested in the subject-matter of the action, and who would be injuriously affected if the relief prayed for was granted—namely, those Indians to whom have been allotted 55,281.84 acres of the lands involved.

That the court is without jurisdiction because it appears on the face of the bill that the Indians residing on the lands in controversy are necessary parties to a final determination of the action.

Because it appears on the face of the bill that persons materially interested in the subject-matter of the action are not made parties thereto, the same being residents and citizens of the State of Oregon, and also citizens of the United States, and without whose presence a court, acting as a court of equity, could not proceed; and who can not properly be made parties to this proceeding.

It is alleged, in effect, in the bill (pp. 11, 12, 28), that of the lands in controversy there have been allotted to the Indians residing on the Klamath Reservation, under section 5 of the general allotment act (24 Stat., 388, 389), 55,281.84 acres.

By reason of such allotments the Indian allottees became, under the provisions of section 6 of the general allotment act, citizens of the United States and of the State of Oregon (*Matter of Heff*, 197 U. S., 488).

It is therefore submitted that the force and effect of this allegation is that the allottees are interested parties and will be materially affected by a decree in favor of the State; therefore they should be made parties. *Shields* v. *Barrow*, 17 How., 130, 139; *Chadbourne's Executors* v. *Coe*, 10 U. S. App., 78, 83-84. As the allottees are residents of Oregon and citizens thereof (*Matter of Heff*, supra), if they are made parties the jurisdiction of the court would for that reason,

be ousted. *California* v. *Southern Pacific Company*, 157 U. S., 229; *Minnesota* v. *Northern Securities Company*, 184 U. S., 199, 245, 246, 247.

V.

THE ACTION IS LEGAL, AND NOT EQUITABLE, IN CHARACTER.

This point is presented by paragraph "Eleventh" of the demurrer, which is as follows:

> Because, as appears on the face of the bill, the purpose of this suit is to recover certain real property in the State of Oregon, hence the cause of action is legal, not equitable, and this court, sitting as a court of equity, is without jurisdiction to hear and determine the controversy; and if complainant has any right to said real property it must be asserted, if at all, in a court of law.

The action involves title to real estate. The State of Oregon claims title to the lands in controversy as against the Indians, who are in the possession of the same. The former asserts title to the lands under the provisions of the act of March 12, 1860. The bill in effect states that the latter claim title under the general allotment act and the treaty of 1864. In no event would the State be entitled to the lands unless they were swamp and overflowed in character at the time of the passage of the act under which title is asserted. The question of the character of the lands at the time mentioned is one of fact, and if determined in a judicial proceeding the Indians have a constitutional right

to have the same passed upon by a jury. (*Hipp* v. *Babin*, 19 Howard, 278; *Lewis* v. *Colbs*, 23 Wall., 466, 470; *McCormick* v. *Hayes*, 159 U. S., 332.)

VI.

THE MATTERS COMPLAINED OF ARE NOT THE SUBJECT OF JUDICIAL COGNIZANCE.

This point is presented by paragraphs "Fourth," "Eighth," and "Ninth" of the demurrer, which are as follows:

> That the court has not jurisdiction of this case, because it appears on the face of the bill that the lands claimed by the complainant are burdened with a right of occupancy in the Klamath, Modoc, and Yahooskin tribes or bands of Indians.
>
> Because on the face of the bill it appears that the acts complained of against these defendants and the acts sought to be enjoined are such as are exclusively within the jurisdiction of the Interior Department of the United States Government—are judicial and not ministerial in character—and are not subject to control, interference, or review by the Judiciary Department in injunction proceedings.
>
> Because on the face of the bill it appears that there has not been an adjudication by the defendants, or either of them, to the effect that the lands involved were, on March 12, 1860, swamp and overflowed lands, within the meaning of the first section of the act of September 28, 1850, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits."

The legal title to the lands involved is in the United States. The State admits they are burdened with the Indian right of occupancy. It is settled law that until the Indian right of occupancy to lands has been extinguished the Indian Bureau, of which the Secretary of the Interior is the head, has jurisdiction and control over the lands so occupied. (*United States* v. *Thomas*, 151 U. S., 577.)

It is also well settled that until the legal title to the land passes from the Government inquiry as to all equitable rights comes within the cognizance of the Land Department. (*Brown* v. *Hitchcock*, 173 U. S., 473; *Humbird* v. *Avery*, 195 U. S., 480, 502, 503.)

The State admits in the bill of complaint that there has been no finding by the Land Department, of which the Secretary of the Interior is the head, that the lands were swamp or overflowed in character on March 12, 1860. Until such finding is made and patent issued the grant is in process of administration. (*Michigan Land and Lumber Company* v. *Rust*, 168 U. S., 589, 591–592; *New Orleans* v. *Paine*, 147 U. S., 261, 266.)

The acts which the bill alleges the defendants to threaten to perform are the making of certain allotments and the issuing of trust patents for such allotments. These acts are such as, by law, are imposed upon the defendants and require, on their part, the examination and investigation of facts and the construction and application of laws; hence are judicial and not ministerial in character. Therefore they are not subject to control, review, or correction in injunc-

tion proceedings. (*Gaines* v. *Thompson*, 7 Wallace, 347, 353; *New Orleans* v. *Paine*, 147 U. S., 261, 267; *Brown* v. *Hitchcock*, 173 U. S., 473, 477.)

In respect to that portion of the bill wherein it is alleged that sufficient available lands will remain within the limits of the reservation, outside of those herein claimed by the State, to fully satisfy all allotments to Indians resident upon the reservation (pp. 29, 30), we invite the attention of the court to the case of *United States* v. *California and Oregon Land Company, successor to the Oregon Central Military Wagon Road Company* (192 U. S., 355), wherein the claim of said company to 109,000 acres of land erroneously patented under the military wagon-road grant within the limits of said Indian reservation was sustained (by a divided court) upon the ground that the question of the right of the Indians should have been set forth in a former action brought by the Government under the act of March 2, 1889 (25 Stat., 850), entitled "An act providing in certain cases for the forfeiture of wagon-road grants in the State of Oregon."

Of this amount 24,000 acres had already been allotted to the Indians resident upon said reservation, and by the act of March 3, 1905 (33 Stat. L., 1033) the Secretary of the Interior was authorized to negotiate with the California and Oregon Land Company looking to a release or reconveyance of said lands to the United States, to the end that it might keep its treaty agreement with the Indians resident upon said reser-

vation. From the records of the Indian Bureau it appears that the investigation made under this act of Congress discloses that very little, if any, available lands useful for agricultural purposes remain for allotment to the Indians.

It is respectfully submitted that the demurrer of the defendants to complainant's bill of complaint should be sustained and the suit be dismissed.

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Supreme Court of the United States.

No. 16, Original.—October Term, 1905.

The State of Oregon, Complainant, *vs.* Ethan A. Hitchcock, Secretary of the Interior, and William A. Richards, Commissioner of the General Land Office.	In Equity. Original Bill of Complaint.

[April 23, 1906.]

By leave of court the State of Oregon filed an original bill against Ethan A. Hitchcock, Secretary of the Interior, and William A. Richards, Commissioner of the General Land Office, to restrain the defendants from allotting or patenting to any Indians or other persons certain lands within the limits of the Klamath Reservation, which it is alleged were on March 12, 1860, swamp and overflowed lands, and praying a decree establishing the title of the State of Oregon to such lands and declaring that the title is subject only to such right of temporary and terminable occupation as may exist in the Indians at present occupying the said reservation, and is not to be defeated by any allotment, patent, agreement or other arrangement. To this bill the defendants filed a demurrer, partly on jurisdictional grounds and partly on the merits.

For a clear understanding of the questions presented the allegations in the bill must be stated. It is alleged that the defendant Hitchcock is a citizen of the State of Missouri, the defendant Richards of the State of Wyoming; that by an act of Congress, approved February 14, 1859, (11 Stat. 383,) Oregon was admitted into the Union; that by an act approved September 28, 1850, (9 Stat. 519,) Congress granted to the State of Arkansas and other States all lands, within their respective limits, which at the date of the act were "swamp and overflowed lands," and by reason thereof unfit for cultivation; that by an act of March 12, 1860, (12 Stat. 3,) the provisions of the last-named act were extended to the State of Oregon; that on February 14, 1859, as well as on March 12, 1860, the United States owned in fee simple a large region and body of land lying within the boundaries of the State of Oregon, which said body of land was neither reserved nor dedicated to any public use and was free from any claim of title or possession, saving and excepting a right to temporary use and occupation belonging to certain Indian tribes; that within this large body of lands were three tribes or bands of Indians—the Klamaths, the Modocs and the Yahooskins—few in number, that number being

estimated by the officials of the United States in charge at from 1,200 to 1,500; that they were all in a savage state, uncivilized, without a fixed place of abode and roaming from place to place within the region; that they had no other kind of tenure or title than that which they and their ancestors held from time immemorial and before the settlement of white men in the territory; that on October 14, 1864, (16 Stat. 707,) a treaty was negotiated between the United States and these tribes of Indians, by which they ceded to the United States their right, title and claim to all these lands, except a certain specified and smaller tract within the original outboundaries, which was created a reservation for their use; that said reservation was continued in the occupation of the Indians according to the aboriginal usages and customs of said Indians and of Indians generally, without any claim or pretence of permanent title or individual right to the lands, or any of them, and without any steps taken towards conferring the ultimate title upon them until after the year 1899, when the defendant Hitchcock, Secretary of the Interior, directed and caused a large portion of the lands to be surveyed and divided into numerous definite lots or tracts, for the purpose and with the intention of allotting such tracts to the individual members of the tribes, to be by them held in severalty, and the further purpose of issuing and delivering to each of them a patent declaring that the United States holds the tract allotted in trust for the Indian and his heirs for a period of twenty-five years, and that at the expiration of such period it will convey the tract to him or his heirs discharged of the trust and free from all incumbrances; that in this the defendant Hitchcock was assuming and professing to act under the authority of the act of Congress of February 8, 1887, (24 Stat. 388;) that within the reservation made by the treaty of 1864 were large tracts, which had been and were on March 12, 1860, swamp and overflowed lands and unfit for cultivation, and hence under the act of March 12, 1860, had become the property of the State, subject only to the right of occupancy on the part of the Indians; that in the year 1902, before any patents were issued and while the surveying and allotting were in progress, the State caused an examination to be made for the purpose of ascertaining the tracts which on March 12, 1860, were swamp and overflowed lands, and a list prepared of them, which list is attached to the bill as an exhibit; that it presented and filed that list with the surveyor general of the United States for the State of Oregon, together with evidence tending to prove that all of the tracts within the list had been and were on March 12, 1860, swamp and overflowed lands and rendered thereby unfit for cultivation, which evidence was found and certified by the surveyor general to be sufficient. That thereupon the State selected and claimed said tracts as granted to it by the act of Congress of March 12, 1860, and applied to the proper officers of the United States to inquire into and consider the claims of the State; that this application and the evi-

dence was submitted to the defendant Richards, as Commissioner of the General Land Office, and on November 18, 1903, the Acting Commissioner denied and rejected the claim upon the sole ground that the lands, whether swamp and overflowed or not, were not granted to the State of Oregon by the act of Congress. From this decision an appeal was taken to the Secretary of the Interior, and the decision of the Land Office affirmed.

Mr. Justice BREWER delivered the opinion of the Court.

The question of jurisdiction of course precedes any inquiry into the merits. By Sec. 2 of Art. III of the Constitution and Sec. 687, R. S., this court has original jurisdiction of a suit brought by a State against citizens of other States. *Pennsylvania* v. *Quicksilver Company*, 10 Wall. 553; *Wisconsin* v. *Pelican Insurance Company*, 127 U. S. 265, 287, and cases cited in the opinion; *California* v. *Southern Pacific Company*, 157 U. S. 229, 258; *Minnesota* v. *Hitchcock*, 185 U. S. 373. But the contention is that the United States is the real party in interest as defendant, that it cannot be sued without its consent, and that it has given no consent. While the nominal defendants are citizens of a State other than Oregon, yet they have no interest whatever in the controversy, and if a decree be rendered against them in favor of the State it will not affect their interests but bind and determine the rights of the United States, the real, substantial defendant. It is further said that if there is any other interest adverse to the plaintiff it belongs to the Klamath Indians, who are not made parties, and that the rule in equity is not to determine a suit without the presence of the parties really to be affected by the decree. *California* v. *Southern Pacific Company*, *supra*.

The question of jurisdiction in a case very similar to this was fully considered in *Minnesota* v. *Hitchcock*, *supra*. There, as here, a State was plaintiff, and the suit was brought against the Secretary of the Interior and the Commissioner of the General Land Office to restrain them from selling school sections 16 and 36 in what was known as the "Red Lake Indian Reservation." This suit is brought by a State against the same officers, to restrain them from allotting and patenting in severalty swamp lands within the Klamath Indian Reservation. In that case we said (p. 387):

"Now, the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the Government of its title and vest it in the State. The United States is, therefore, the real party affected by the judgment and against which, in fact, it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a State is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree

which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered."

It is true in that case we sustained the jurisdiction of this court, but we did so by virtue of the act of March 2, 1901, (31 Stat. 950,) which was held to be a consent on the part of the United States to be sued in respect to school lands within an Indian reservation and an acceptance by the Government of full responsibility for the result of the decision, so far as the Indians, its wards, were concerned. But neither of the two facts deemed essential to the maintenance of that suit appear in this. There is no act of Congress waiving immunity of the United States or consenting that it be sued in respect to swamp lands, either within or without an Indian reservation, and there is no act of Congress assuming full responsibilty in behalf of its wards, the Indians, for the result of any suit affecting their rights in these lands. It is unnecessary to repeat all that was said in that opinion in reference to these matters. It is sufficient to refer to it for a full discussion of the question.

Again, it must be noticed that the legal title to all these tracts of land is still in the Government. No patents or conveyances of any kind have been executed. There has been no finding or adjudication by the Land Department that the lands referred to were swamp or overflowed on March 12, 1860. Under those circumstances it is not a province of the courts to interfere with the Land Department in its administration. So far as a grant of swamp lands is claimed, it must be held that the grant is in process of administration, and, until the legal title passes from the Government, inquiry as to equitable rights comes within the cognizance of the Land Department. Courts may not anticipate its action or take upon themselves the administration of the land grants of the United States. *New Orleans* v. *Paine*, 147 U. S. 261, 266; *Michigan Land & Lumber Company* v. *Rust*, 168 U. S. 589, 591; *United States* v. *Thomas*, 151 U. S. 577; *Brown* v. *Hitchcock*, 173 U. S. 473; *Humbird* v. *Avery*, 195 U. S. 480, 502, 503.

For these reasons the demurrer is sustained and the bill is

Dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.